TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1887.

No. ~~[illegible]~~ 87

THE NASHUA MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

THE SOUTH CAROLINA RAILWAY COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

FILED OCTOBER 8, 1885.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

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1 THE UNITED STATES OF AMERICA, *District of South Carolina,* } *To wit:*

At a circuit court of the United States for the fourth circuit in and for the district of South Carolina, begun and holden at Charleston, in the district aforesaid, on the first Monday in April, 1885, before the Honorable Hugh L. Bond and the — George S. Bryan, judges of the said United States — for the district of South Carolina, holding said circuit court according to the form of the act of Congress in such case made and provided, the following proceedings were had:

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

THE NASHUA MANUFACTURING COMPANY, a Corporation under the Laws of New Hampshire, Plaintiff,
against
THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation under the Laws of South Carolina, Defendant.

2 Be it remembered that heretofore, to wit, on the 14th day of November, in the year of our Lord one thousand eight hundred and eighty-four, came into court the defendant, The South Carolina Railway Company, by its attorneys, Simonton and Barker, and filed the following certified copies of a complaint, summons, and answer, a petition for removal of cause, a bond, an order for removal of cause, and a certificate from the clerk of the court of common pleas and general sessions for Charleston county, State of South Carolina; which complaint, summons, answer, petition for removal of cause, bond, order for removal of cause, and certificate are in the words and tenor following:

Complaint.

THE STATE OF SOUTH CAROLINA, *County of Charleston:*

In the Court of Common Pleas.

THE NASHUA MANUFACTURING COMPANY, Plaintiff,
against
THE SOUTH CAROLINA RAILWAY COMPANY, Defendant.

3 The plaintiff above named, complaining of the defendant, alleges—

I. That the plaintiff is a corporation created by and under the laws of the State of New Hampshire, and the defendant is a corporation created by and under the laws of the State of South Carolina, and that said defendant is a common carrier, doing business as such.

II. That on the 8th day of October, A. D. 1883, the Western railroad of Alabama received from Harrington Bros., Opelika, Alabama, twenty-five bales of cotton to be transported, for the freight money then agreed upon, from Opelika aforesaid over and by the

said Western railroad of Alabama and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua, New Hampshire.

That on the 11th day of October, A. D. 1883, the Western railroad of Alabama received from Harrington Bros., at Opelika, Alabama, twenty-five bales of cotton to be transported, for the freight money then agreed upon, from Opelika aforesaid over and by the said Western railroad of Alabama and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

4 That on the 15th day of October, A. D. 1883, the East Alabama Railway Company received from Harrington Bros., at La Fayette, Alabama, one hundred and sixty-nine bales of cotton to be delivered to the Western railroad of Alabama at Opelika aforesaid and by the said Western railroad of Alabama to be transported, for freight money theretofore agreed upon, from Opelika aforesaid over and by the said Western railroad of Alabama and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 13th day of October, A. D. 1883, the Western railroad of Alabama received from Harrington Bros., at Opelika, Alabama, forty bales of cotton to be transported, for the freight money then agreed upon, from Opelika aforesaid over and by the said Western railroad of Alabama and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 10th day of October, A. D. 1883, the East Alabama Railway Company received from Harrington Bros., at La Fayette, Alabama, fifty-five bales of cotton to be delivered to the

5 Western railroad of Alabama at Opelika, and thence transported, for freight money theretofore agreed upon, from Opelika aforesaid over and by the said Western railroad of Alabama and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 12th day of October, A. D. 1883, at Hogansville, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. three bales of cotton to be transported, for the freight money then agreed upon, from Hogansville aforesaid over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 18th day of October, A. D. 1883, at Hogansville, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. twelve bales of cotton to be transported, for the freight money then agreed upon, from Hogansville aforesaid over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

6 That on the 18th day of October, A. D. 1883, at Newman, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. twelve bales of cotton to be transported,

for the freight money then agreed upon, from Newman aforesaid over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 10th day of October, A. D. 1883, at Grantville, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. three bales of cotton to be transported, for the freight money then agreed upon, from Grantville aforesaid over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 17th day of October, A. D. 1883, at West Point, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. twenty-eight bales of cotton to be transported, for the freight money then agreed upon, from West Point aforesaid over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until
7 delivered to the plaintiff at the town of Nashua aforesaid.

That on the 22nd day of October, A. D. 1883, at Newman, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. eight bales of cotton to be transported, for the freight money then agreed upon, from Newman aforesaid over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 15th day of October, A. D. 1883, at West Point, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. twenty-seven bales of cotton to be transported, for the freight money then agreed upon, from West Point aforesaid over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 18th day of October, A. D. 1883, at Hogansville, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. thirty-eight bales of cotton to be transported, for the freight money then agreed upon, from Hogansville aforesaid over and by the Atlanta and West Point railroad and its
8 connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 19th day of October, A. D. 1883, at Grantville, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. fifty-six bales of cotton to be transported from Grantville aforesaid, for the freight money then agreed upon, over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

That on the 22nd day of October, A. D. 1883, at West Point, Georgia, the Atlanta and West Point Railroad Company received from Harrington Bros. twenty-one bales of cotton to be transported, for the freight money then agreed upon, from West Point aforesaid

over and by the Atlanta and West Point railroad and its connecting roads and lines of transportation until delivered to the plaintiff at the town of Nashua aforesaid.

III. That the several lots of cotton shipped, as set forth in paragraph II herein and amounting in the aggregate to five hundred and twenty-two bales, were in the course of said transportation delivered to and received by the defendant, a common carrier
9 and one of the aforesaid connecting lines of transportation, in the city of Augusta, Georgia, to be by the said defendant, for its proportion of the freight money agreed upon as aforesaid, safely carried to Charleston, South Carolina, and there delivered to the next connecting carrier in course of transportation to their place of destination as aforesaid.

IV. That said defendant did not safely carry and deliver as aforesaid the said five hundred and twenty-two bales of cotton, but, on the contrary, whilst the said cotton, so received for transportation by the said defendant, as alleged in paragraph III herein, was in the possession and custody and under the control of the defendant as a common carrier, two hundred and seventy-four bales thereof were, by the carelessness and negligence of the defendant, its officers, agents, and servants, destroyed by fire, to the damage of the plaintiff sixteen thousand dollars ($16,000).

Wherefore plaintiff demands judgment against the defendant for their damages as aforesaid and costs of this action.

[SEAL.] J. N. NATHANS,
Plaintiff's Attorney.

A true copy.

W. W. SALE,
C. C. P. & G. S.

10 (Endorsed:) Filed Aug. 8, 1884.

Summons.

THE STATE OF SOUTH CAROLINA, *County of Charleston:*

Court of Common Pleas.

THE NASHUA MANUFACTURING COMPANY, Plaintiff,

against

THE SOUTH CAROLINA RAILWAY COMPANY, Defendant.

Copy. Summons for relief. Complaint served.

To the defendant, The South Carolina Railway Company:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, 63 Broad street, Charleston, S. C., within twenty days after the service hereof, exclusive of the day of such service, and if you fail to answer the complaint within the time aforesaid

11 the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated July 9, A. D. 1884.

J. N. NATHANS,
Plaintiff's Attorney.

[L. S.] W. W. SALE,
C. C. P. & G. S.

A true copy.
[SEAL.]

W. W. SALE,
C. C. P. & G. S.

(Endorsed:) Filed Aug. 8, 1884.

Sheriff's Return on Summons.

STATE OF SOUTH CAROLINA, *County of Charleston:*

THE NASHUA MANUFACTURING CO.
vs.
THE SOUTH CAROLINA RAILWAY CO.

P. Donnelly, being duly sworn, says that he served the summons and complaint in this action on the defendant by delivering to Henry Ingraham, cl'k So. Ca. R. R., personally, and leaving with him copies of the same at the corner of King & Ann St., Charleston, So. Ca., a person over twenty-one years, of discretion, residing with him,
12 on the 10th day of July, 1884, and left with him copies of the same for Jno. B. Peck, general manager So. Ca. Railway Company, and that he knows the person as served to be Henry Ingraham, over 21 years of age, and promised to deliver the said summons and complaint to Jno. B. Peck, general manager of So. Ca. R. Co., and deponent is not a party to this action.

P. DONNELLY.

Sworn to before me this 10th day of July, A. D. 1884.
MARTIN W. WIGG,
Notary Public.

Answer.

STATE OF SOUTH CAROLINA, *County of Charleston:*

In the Common Pleas.

THE NASHUA MANUFACTURING COMPANY, Plaintiff,
vs.
THE SOUTH CAROLINA RAILWAY COMPANY.

The answer of the South Carolina Railway Company, defendant.

13 This defendant, answering the complaint herein, says:

1. That it admits that the plaintiff is a corporation, as is alleged, and that the defendant is a corporation, under the laws of the State of South Carolina, and is a common carrier.

2. That it admits the statements of the 2nd paragraph of the complaint respecting the receipt of cotton by the Western railroad of Alabama and the Atlanta and West Point Railroad Company, the number of bales shipped, the places of shipment, the destination of the cotton, and the shippers of the cotton, which said bales of cotton were received by the defendant from the connecting roads, and were carried by it to Charleston, its teminus, and it avers that all of the said cotton was carried under certain contracts, specified and set forth in bills of lading given therefor at the date of receipt and shipment, which bills of lading were held for or by the plaintiff.

3. It admits that of the five hundred and twenty-two bales of cotton so received and carried by defendant under bills of lading as aforesaid two hundred and seventy-four bales of cotton were,
14 on the — day of ——, burned in the yards of the defendant, but without any negligence or fraud on the part of defendant or any of its agents.

For a first defence.

That of the two hundred and seventy-four bales of cotton so burned one hundred and eight bales were received and carried under a bill of lading containing the stipulation following, to the benefit of which this defendant is entitled, to wit: "Neither the Atlanta and West Point Railroad Company, the companies constituting the through line, nor any of them, will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods freshets, rust, loss in weight, mending, fire, or any other case whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit, or be waiting shipment or delivery, or be in
15 depots, at stations, on wharves, or at sea, or in port, or on cars, boat, vessel, or steamer;" and this defendant avers that no one of the said one hundred and eighty bales of cotton were burned, nor did the said fire occur, from or by reason of the fraud or gross negligence of this defendant, its agent or agents.

For a second defence.

1. That of the two hundred and seventy-four bales of cotton so burned as aforesaid one hundred and eight bales were receipted by and shipped by the Atlanta and West Point Railroad Company, and bills of lading given therefor by said Atlanta and West Point Railroad Company, acting in this behalf for each of the connecting lines of which defendant was one, which bills of lading and each of them contained the following stipulation, to the benefit of which this defendant is entitled, to wit: "And it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the

company alone shall be held responsible therefor in whose
16 actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton."

2. That the plaintiff had insured the said cotton so destroyed by fire against risks, of which fire was one, in the American Insurance Company, which insurance company, on information and belief, defendant avers, is solvent, and that at the date of said fire the said cotton was covered by said insurance.

3. That the plaintiff have not given to the defendant, in accordance with the terms of the bill of lading, the benefit of the said insurance.

For a third defence.

1. That of the said two hundred and seventy-four bales of cotton so burned as aforesaid this defendant has accounted for and paid to the plaintiff the full value of one hundred and sixty-six bales, the same being that part of the said two hundred and seventy-four bales not protected by any stipulation in the bills of lading given therefor.

17 Wherefore the defendant demands judgment, and that the complaint be dismissed.

SIMONTON & BARKER.
Def't's Att'ys.

A true copy.
[SEAL.]

W. W. SALE,
C. C. P. & G. S.

Acceptance of Service.

I acknowledge service of a copy of within answer this 7 day of August, 1884.

J. N. NATHANS.

(Endorsed:) Filed Aug. 8, 1884.

Petition for Removal of Cause.

THE STATE OF SOUTH CAROLINA, *Charleston County:*

THE NASHUA MANUFACTURING COMPANY
vs.
THE SOUTH CAROLINA RAILWAY COMPANY.

18 *Ex Parte* THE SOUTH CAROLINA RAILWAY COMPANY.

To the honorable the court of common pleas for said county:

The petition of the South Carolina Railway Company respectfully shows that at the commencement of this suit it was and still is a citizen of the State of South Carolina, and that the Nashua Manufacturing Company, as by the statement in the complaint, was and that it still is a citizen of the State of New Hampshire, and that they are the sole parties plaintiff and defendant to this suit; that

the matter in controversy exceeds, exclusive of costs, the sum or value of five hundred dollars. Your petitioner makes and files herewith a bond, with good and sufficient surety, for its entering at the circuit court of the United States for the district of South Carolina, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said circuit court shall hold that this suit has been wrongfully or improperly removed thereto.

19 Your petitioner therefore prays this honorable court to accept this petition and said bond and order the transfer of said suit to said circuit court of the United States for the district of South Carolina.

SIMONTON & BARKER,
Attorneys for Petitioner.

THE STATE OF SOUTH CAROLINA:

Before me personally appeared Charles H. Simonton, att'y, who on oath says that the statements of this petition are true.

(S'g'd) CHARLES H. SIMONTON.

Sworn to this 8 day of August, 1884.

D. B. GILLILAND,
Not'y Pub.

A true copy.
[SEAL.]

W. W. SALE,
C. C. P. & G. S.

Acceptance of Service.

Copy of within petition accepted.
Aug. 8, 1884.

J. N. NATHANS,
Pl'ff's Att'y.

(Endorsed:) Filed Aug. 8, 1884.

20 *Order for Removal of Cause.*

STATE OF SOUTH CAROLINA, *Charleston County:*

THE NASHUA MANUFACTURING COMPANY
vs.
THE SOUTH CAROLINA RAILWAY COMPANY.

Ex Parte THE SOUTH CAROLINA RAILWAY COMPANY.

Hearing the petition, and it appearing that the petition comes within the provisions of the act of Congress in such cases made and provided, and that it has complied with all the provisions of said acts—

Ordered that the cause be removed to the circuit court of the United States for the district of South Carolina.

Nov. 7, 1884.

G. B. FRASER,
Presiding Judge.

A true copy.
[SEAL.]

W. W. SALE,
C. C. P. & G. S.

21 (Endorsed:) I consent. J. N. Nathans. Filed Nov. 7, 1884.

Bond.

STATE OF SOUTH CAROLINA, *Charleston County:*

THE NASHUA MANUFACTURING COMPANY

vs.

THE SOUTH CAROLINA RAILWAY COMPANY.

Know all men by these presents that the South Carolina Railway Company, as principal, and —— ——, as sureties, are held and firmly bound unto the Nashua Manufacturing Company in the penal sum of fifty dollars; for the payment whereof, well and truly to be made unto the said The Nashua Manufacturing Company, its heirs, representatives, and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said The South Carolina Railway Company having petitioned the honorable the court of common pleas for Charleston county, State of South Carolina, for the removal of a certain cause therein pending wherein The Nashua
22 Manufacturing Company is plaintiff and the South Carolina Railway Company, defendant, to the circuit court of the United States in and for the district of South Carolina: Now, if the said The South Carolina Railway Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this seventh day of August, A. D. 1884.

THE SOUTH CAROLINA R'Y CO.,
By JOHH B. PECK, *Gen'l Manager.* [L. S.]
CHARLES H. SIMONTON. [L. S.]
—— ——. [L. S.]

In presence of—
S. B. PICKENS.

STATE OF SOUTH CAROLINA, }
County of Charleston, } *ss:*

23 I, —— ——, of said county, the surety named in the foregoing bond, being duly sworn, do depose and say that I am a resident of the State of South Carolina and a property holder therein; that I am worth the sum of five hundred dollars over and above all my debts and liabilities and exclusive of property by law

exempt from execution; that I have property in the State of South Carolina liable to execution of the value of more than five hundred dollars.

—— ——.

Sworn to before me this — day of ——, A. D. 188–.

—— ——,

———.

A true copy.
[SEAL.]

W. W. SALE,
C. C. P. & G. S.

(Endorsed:) Filed Aug. 8, 1884.

Certificate.

STATE OF SOUTH CAROLINA, *Charleston County:*

I, W. W. Sale, clerk of common pleas and general sessions,
24 county and State aforesaid, do hereby certify that the following papers, consisting of a summons and complaint, an answer, a petition for removal of cause, a bond, and an order for removal of cause, are true and exact copies and a complete record in the case of The Nashua Manufacturing Company *vs.* The South Carolina Railway Company, the originals of which are on file in my office.

Nov. 12, 1884.

W. W. SALE,
C. C. P. & G. S.

And at the April term of the said court, begun and holden at Charleston aforesaid, on the first Monday in April, 1885, this case came up for trial before the following jury, to wit: James Armstrong, foreman; T. C. Haile, W. J. Bradford, S. W. Williams, Samuel Douglas, John H. Williams, T. M. L. Kirkland, Thomas Baskins, W. D. Ussery, J. S. McCain, John F. Seignous, and W. H. Chaffee.

The pleadings were read to the court and jury and the following testimony was introduced by the plaintiff, which testimony is in the words and tenor following:

25 *Testimony in Behalf of Plaintiff.*

In the Circuit Court of the United States, District of South Carolina.

THE NASHUA MANUFACTURING COMPANY, a Corporation under the Laws of New Hampshire, Plaintiff,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation under the Laws of South Carolina, Defendant.

Notice to take testimony pursuant to sec's 863, 864, and 865 of U. S. R. S.

Messrs. Simonton and Barker, defendant's attorneys:

Please take notice that at 11 a. m. on Wednesday, the 19th day of November, A. D. 1884, will be taken on behalf of plaintiff herein,

before Henry C. Merwin, a notary public in and for the city of Boston and State of Massachusetts, at his office, No. 40 Water street, in said city and State, the deposition *de bene esse* — Frederick Amory,
treasurer of the aforesaid Nashua Manufacturing Company,
26 at which time and place you are entitled to be present and
cross-examine the said witness, the said witness being a resident of and living in the said city of Boston, at a distance of more than one hundred miles from the place where the trial of this action is to be held.

And should the examination of said witness not be concluded on the day herein named, then his examination will be taken on each succeeding day, Sundays excepted, at the same time and place, before the officer above named, until such examination shall have been concluded.

November 6th, 1884.

J. N. NATHANS,
Pl'ff's Att'y.

In the Circuit Court of the United States for the District of South Carolina.

THE NASHUA MANUFACTURING COMPANY

v.

THE SOUTH CAROLINA RAILWAY COMPANY.

STATE OF MASSACHUSETTS,
District of Massachusetts, County of Suffolk:

27 FREDERICK AMORY, a witness called on behalf of the plaintiff herein, and residing at Boston, Mass., more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

Deposition of Frederick Amory.

Direct examination by ROBERT GARDINER, Esq., counsel for plaintiff:

Int. 1. State your name, age, residence, and occupation.

Ans. Frederick Amory; 40 years; Boston, Mass.; treasurer of Nashua M'f'g Co.

Int. 2. State whether or not any cotton belonging to the Nashua M'f'g Co. was burned at Charleston in the autum of '83; and, if yes, state how many bales were burned, when and where they were burned, and state your sources of information.

Ans. Yes; 274 bales, the 29th day of October, 1883, in the yards of the South Carolina R'y Co. From a letter dated Charleston, S. C., Nov. 12, 1883——

Int. 3. Please read the letter.

Ans. —

"SOUTH CAROLINA RAILWAY CO.,
"CHARLESTON, S. C., *Nov.* 12, 1883.

28 "To Nashua Man'f. Co., Nashua, N. H.:

"There were burned on the 29th day of October, 1883, in the yards of this company, awaiting transfer to the steamer, 274 bales of cotton marked [N. A.] D. W. 196, [N. A.] E. W. 78, and shipped by * * * of * * * to you. Please send sworn copies of invoice of this cotton and certified copies of bills of lading for the same, also affidavits as to what marine, inland marine, or fire insurance was taken on said cotton. It is desired to liquidate promptly any liability that may attach to this company by the burning of said cotton, and I therefore request prompt replies to the above inquiries.

"Yours respectfully, JOHN B. PECK,
"*Gen'l Manager.*"

Int. 4. When and from what places was said burned cotton shipped?

Ans. Various places.

Int. 5. State the number of bales burned out of each shipment made.

Ans. I cannot.

Int. 6. State how many bales were burned for which the common carrier had issued bills of lading purporting to give the carrier in whose custody said cotton might be at the time of the happening of any loss or damage to said cotton the benefit of any insur-

29 ance effected upon or on account of the cotton.

Ans. 166—the least amount of bales burned which had been shipped under bills of lading not containing that clause.

Int. 7. Can you give any more definite answer to the last question?

Ans. No.

Int. 8. Did you make any inquiries to obtain the information asked for in the 6th question?

Ans. We examined all the bales at the mills that we could, but the marks in many cases were so obliterated in shipment that it was impossible to determine all the marks.

Int. 9. Please state what bales you examined and what was the object of the examination.

Ans. We compared the marks discovered on those bales at the mill which had been saved from the fire and compared them as far as possible with the list of the shippers' marks so as to ascertain what and how many bales were burned.

Int. 10. Did you receive any statement from the South Carolina railway about the number of bales burned out of each shipment?

Ans. I received the following: "Office freight agent South

30 Carolina Railway Co. Respectfully: These brands coming from Lafayette, Opelika, Ala., Hogansville, and Grantsville, Ga., it was impossible after the fire to be able to state what shipments were lost and what saved, as all were mixed together. The total number lost, 274, is correct. C. D. Bateman, ag't."

Int. 11. How many, if any, of the remaining 108 bales out of the 274 burned were shipped under bills of lading containing the insurance clause referred to in the 6th question?

Ans. I don't know.

Int. 12. Were any of them?

Ans. I suppose some.

Int. 13. Do you know whether any were?

Ans. No; I don't know.

Int. 14. Is it possible that none of these 108 bales were shipped under bills of lading containing the insurance clause?

Ans. Yes; it's possible, of course.

Int. 15. Have you received payment for the cotton destroyed or any part of it?

Ans. Yes; for a part of it; for 166 bales.

Int. 16. Who paid you?

Ans. The South Carolina Railway Co.

Int. 17. State whether or not that payment was received in full or whether it was a payment on account, without interest
31 or costs, and was received without prejudice to your claim.

Ans. It was received on account as part payment for the loss without interest or costs and not to prejudice our claim for the whole loss.

Int. 18. Have your insurers paid you any part of your loss?

Ans. The American Insurance Co. paid on the same terms for these same 166 bales.

Int. 19. Have you brought suit against your insurers?

Ans. Yes; at the April term, 1884.

Int. 20. Have your insurers paid or agreed to pay, or given you any hope or expectation that they will pay, the whole or any part of the remainder of your loss?

Ans. No.

Int. 21. Have you made any offer of settlement to the said railway; and, if so, what?

Ans. I have offered to allow them to take this suit, that offer not to prejudice our claim against them.

Int. 22. Was that offer accepted?

Ans. No.

Int. 23. What authority, if any, had your agent, or any of them who shipped this cotton, to ship it under bills of lading containing the insurance clause?

Ans. They had no authority.

32 Int. 24. What authority, if any, had your agents, or any of them, who shipped this cotton, to make any contract or agreement to give the carrier the benefit of insurance in case of loss?

Ans. None from me.

Int. 25. Was any one but you authorized to give them any such authority?

Ans. No.

Int. 26. Did any of them make any such contract or agreement?

Ans. None that I know of.

Int. 27. What was the value of the cotton burned?
Ans. $51.34 per bale—$14,067.16.

Cross-examination by F. J. STINSSON, Esq., counsel for the South Carolina Railway Co.:

Cross-int. 28. When you were requested to send on copies of the bills of lading to the South Carolina R'y Co. shortly after the fire did you do it?
Ans. Of course I did.
X 29. How did you know that at least 166 bales were burned that did not have that insurance clause?
Ans. We verified them by comparing with the lists of the shippers.
X 30. Of the 274 bales burned how many bills of lading were there?
33 Ans. There were fifteen bills of lading, covering the cotton which was in Charleston at the time of the fire.
X 31. How many of those bills had the insurance clause, and how many bales of cotton were covered by each such bill?
Ans. Ten bills of lading covered 208 bales.
X 32. How many of those 208 bales, to the best of your knowledge, have you ever received?
Ans. I could not tell you.
X 33. But you arrived at the knowledge that 166 bales, at least, which were burned, did not have that clause?
Ans. Yes.
X 34. Now, if you could find out how many bales were burned which did not have that clause, why could you not find out how many bales were burned which did have that clause?
Ans. Because we could not find marks on all the bales of those saved from the fire.
X 35. How many bales were saved from the fire?
Ans. 248.
X 36. Then you say that there were 274 bales burned and 248 saved, making 522; that, of those 522, 208, and not more than 208, had the insurance clause in the bill of lading?
Ans. Yes.
34 X 37. Was the so-called insurance clause the same in all the bills of lading?
Ans. They appear to be all of the same form.
X 38. Will you read that clause in one of them?
Ans. I read: "And the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton."
X 39. When did the railway company pay for the 166 bales?
Ans. I think it was about the 1st of June, 1884.
X 40. When did you bring suit against the railway Co.?
Ans. I think it was last summer.
X 41. You don't know anything about the suit, then, personally?
Ans. No; not any more than any business man knows about his lawyer's business.

X 42. What costs had you incurred up to the time of the payment by the railway Co.?

Ans. I do not know.

X 43. You don't know that you had brought suit before such payment?

Ans. No; I do not know; I should say not.

X 44. Was the full value of that 166 bales paid by the insurance Co.?

Ans. They paid the insured value.

35 X 45. Then you recovered twice on those 166 bales—once from the railway and once from the insurance company?

Ans. We received two payments.

X 46. You received the full value of the cotton from the railway Co. and the full insured value from the insurance company?

Ans. We received payment from the railway at $51.34 per bale, without interest, and received payment from the insurance company at the insured value, with interest, crediting the insurance company with the amount received from the railway.

X 47. What was the insured value per bale?

Ans. I think $60 per bale.

X 48. You said that the payment made by the railway Co. was received on account and not as satisfaction in full. Did they know that?

Ans. There was written in the receipt for the payment that it was received without prejudice and without waiving claim for balance of the loss and for interest and costs.

X 49. Had they any knowledge, before sending the payment, that you would only receive it under those conditions?

Ans. I think so.

36 X 50. Did you offer to refund the money if they objected to your receiving it with such an understanding?

Ans. No.

X 51. When did the insurance Co. make their payment?

Ans. I think about the 1st of June, 1884.

X 52. That was after you brought suit against them?

Ans. Yes.

X 53. What became of the suit then?

Ans. It is still pending.

X 54. What are you suing for now?

Ans. The balance of the claim and interest, etc.

X 55. And when you began this suit were you suing for the insurance on the whole 274 bales?

Ans. Yes.

X 56. And did they make payment of that part of the claim, pending the suit, with no special inducement from you?

Ans. We pressed our claims and they made payment without any special inducement.

X 57. You had no agreement or understanding with them, at the time of such payment, as to your future action—with respect to the rest of the claim?

Ans. None whatever; they got a receipt.

X 58. What were the terms of the receipt?

Ans. I have no copy of it; I don't remember.

X 59. When is that suit likely to be tried?

37 Ans. It is awaiting the decision in a similar suit brought by the Jackson Company.

X 60. Who shipped the cotton that was burned?

Ans. Messrs. Harrington Brothers.

X 61. Were they your agents?

Ans. No; this was bought on order of Messrs. Frederick Dexter & Co., cotton buyers, in Boston.

X 62. Are they your ordinary cotton buyers?

Ans. They buy and many others also buy for us.

X 63. In whose name were the bills of lading?

Ans. Nashua M'f'g Co., Nashua, N. H., are the consignees.

X 64. Whom did you mean when you said, in a previous answer, that your agents or any of them had no authority, etc.?

Ans. Any of those who buy directly or indirectly for us.

X 65. They were the people who shipped the cotton and got the bill of lading in the first place?

Ans. Yes.

X 66. And they were some of the agents whom you referred to?

Ans. Yes.

X 67. This condition (the insurance clause) was not an uncommon one in bills of lading of cotton?

Ans. No.

X 68. Had you ever told the railway Co. that your agents

38 had no authority to assent to that condition?

Ans. I never told the railway company anything.

X 69. State, in general terms, what form of policy you had and in what company.

Ans. What is called an "open" policy, in the American Insurance Company.

X 70. For what amount?

Ans. $600,000 or more.

X 71. And you have not collected on that policy any insurance upon 108 bales of those burned?

Ans. No.

X 72. Has the insurance company any defence upon that insurance, to your knowledge?

Ans. No.

X 73. Is the American Insurance Co., in your opinion, solvent?

Ans. Yes.

Redirect:

Int. 74. When were you first informed that this insurance clause was sometimes inserted in bills of lading?

Ans. Some time after the 17th of November, 1883.

Int. 75. You mean to say that before that time you had no knowledge that that clause was ever inserted in bills of lading issued by common carriers?

39 Ans. I never knew of its being inserted in railroad bills of lading before receiving notice of this fire in the yards of the South Carolina Railway Company.

Recross:

X 76. Did you usually read through the bills of lading that you received for cotton shipped?

Ans. No.

X 77. Had you ever done so?

Ans. I don't remember to have before receiving notice of this fire.

FREDERIC AMORY.

Attest:

H. C. MERWIN,
Notary Public.

Subscribed and sworn to before me this 22d day of November, 1884.

[SEAL.] H. C. MERWIN,
Notary Public.

40 In the Circuit Court of the United States for the District of South Carolina.

THE NASHUA MANUFACTURING COMPANY
v.
THE SOUTH CAROLINA RAILWAY COMPANY.

STATE OF MASSACHUSETTS,
District of Massachusetts, County of Suffolk:

I hereby certify that on Saturday, the 22d day of November, 1884 (by adjournment from the 19th day of the said month, by consent, and for the convenience of the parties and their respective counsel and myself), before me, Henry C. Merwin, a notary public in and for the county of Suffolk and State of Massachusetts, at my office, No. 40 Water St., in the city of Boston and county of Suffolk and State of Massachusetts aforesaid, personally appeared before me, pursuant to a notice hereto annexed, between the hours of 11 a. m. and 1 o'clock, Frederick Amory, treasurer, the witness named in said notice, and Robert Gardiner, Esq., appeared as counsel for plaintiff and Fred. J. Stimson, Esq., appeared as counsel for defendant; and the said Frederick Amory, being by me first duly cautioned and sworn to testify the truth, and being carefully examined, deposed and said as appears by the deposition hereto annexed.

41 And I further certify that the said deposition was then and there reduced to writing by me, and was, after it had been reduced to writing, subscribed by the witness, and the same has been received by me for the purpose of sealing up and directing the same to the clerk of the court, as required by law.

And I further certify that the reason why the said deposition was taken was that the said witness resides at Boston, Massachusetts, more than one hundred miles from Charleston, S. C., the place where this cause is to be tried; and I further certify that I am not of

counsel or attorney to either of the parties, nor am I interested in the event of the cause; and I further certify that the fee for taking said deposition, $10, has been paid to me by the plaintiff, and the same is just and reasonable.

In testimony whereof I have hereunto set my hand and official seal, at the city of Boston, in the county of Suffolk and State of Massachusetts, this 22d day of November, A. D. 1884.

[SEAL.] HENRY C. MERWIN, *Not. Pub.*

Acceptance of Service.

Service of a copy of within notice accepted this 6th day of Nov., 1884.

SIMONTON & BARKER.

42 *Plaintiff's Bills of Lading.*

No. 31. (Original.)

The Southern Freight Line via the Western Railroad of Alabama and Ga. R. R.

OPELIKA, ALA., *Oct.* 8, 1883.

Received from Harrington Bros. twenty-five (25) bales of cotton, consigned to Nashua M'f'g Co., at Nashua, N. H., marked and numbered as below, to be transported (with the privilege of compressing) by the Western Railroad of Alabama to the freight station at its terminus, and there to be delivered to such company or carrier whose line may be considered a part of the route to destination, and at destination to be delivered to consignee upon payment of 92 — per hundred pounds freight and charges advanced by this road.

In consideration that the cotton herein described is transported at reduced rates it is mutually agreed, understood, and enacted, as a contract between the shipper and the Western Railroad of Alabama, that, since said cotton must pass through the custody of several carriers to the place of ultimate destination, the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of said cotton as though herein inserted at length, and especially that for all loss or damage occurring in the transit of said cotton the legal remedy shall be sought and held against the particular carrier only in whose custody the said cotton may be at the time of the happening thereof.

No. bales.	Marks.	Weights.
25	[N A] D W	12,500

In witness whereof the agent hath affirmed to 2 bills of lading of this tenor and date, one of which being accomplished the others *are* to stand void.

L. ECHOLS, *Agent.*

[Written across the face:] Via Charleston.

43 No. 42. (Original.)

The Southern Freight Line via the Western Railroad of Alabama and Ga. R. R. & Charleston.

OPELIKA, ALA., *Oct.* 11, 1883.

Received from Harrington Bros. twenty-five (25) bales of cotton, consigned to Nashua M'f'g Co., at Nashua, N. H., marked and numbered as below, to be transported (with the privilege of compressing) by the Western Railroad of Alabama to the freight station at its terminus, and there to be delivered to such company or carrier whose line may be considered a part of the route to destination and at destination to be delivered to consignee upon payment of 92 — per hundred pounds freight and charges advanced by this road.

In consideration that the cotton herein described is transported at reduced rates it is mutually agreed, understood, and enacted as a contract between the shipper and the Western Railroad of Alabama that, since said cotton must pass through the custody of several carriers to the place of ultimate destination, the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of said cotton as though herein inserted at length, and especially that for all loss or damage occurring in the transit of said cotton the legal remedy shall be sought and held against the particular carrier only in whose custody the said cotton may be at the time of the happening thereof.

No. bales.	Marks.	Weights.
25	[N A] D W	13,359

In witness whereof the agent hath affirmed to 2 bills of lading of this tenor and date, one of which being accomplished the others *are* to stand void.

L. ECHOLS, *Agent.*

44 No. 15. Original.

To be delivered to shipper, East Alabama Railway Company.

LA FAYETTE, ALA., STATION, *Oct.* 15th, 1883.

Received from Harrington Bros. one hundred and sixty-nine (169) bales of cotton, — of which are in bad order, all marked as stated below, and consigned to Nashua M'fg Co., at Nashua, N. H., to be transported and delivered to W. R. R. at Opelika at the rate of 92 — per 100 — through.

It is hereby agreed and distinctly understood that in consideration of the transportation of the said cotton at the above-mentioned rates the shipper releases the East Alabama Railway Co. from all liability for any loss or damage which may occur from the bursting

of rope or bagging, old damage, or water while upon their railroad, and from any loss and damage whatever which may occur after delivery to any other railroad Co. or agent for transportation to ultimate destination.

No. Bales.	Marks.	Condition.
97 72	[N A] D W } [N A] E W }	84,000
169		

Fr't paid to Opelika.

W. N. BRAYAM, *Agent*

[Written across the face:] To Nassau, from Opelika, via Charleston.

45 No. 48. (Original.)

The Southern Freight Line via The Western Railroad of Alabama and Ga. R. R. & Charleston.

OPELIKA, ALA., *Oct.* 13, 1883.

Received from Harrington Bros. forty (40) bales of cotton, consigned to Nashua M'f'g Co., at Nashua, N. H., marked and numbered as below, to be transported (with the privilege of compressing) by the Western Railroad of Alabama to the freight station at its terminus, and there to be delivered to such company or carrier whose line may be considered a part of the route to destination, and at destination to be delivered to consignee upon the payment of 92 — per hundred pounds freight and charges advanced by this road.

In consideration that the cotton herein described is transported at reduced rates it is mutually agreed, understood, and enacted as a contract between the shipper and the Western Railroad of Alabama that, since said cotton must pass through the custody of several carriers to the place of ultimate destination, the exceptions from liability made by such carriers, respectively, shall operate in the carriage by them, respectively, of said cotton as though herein inserted at length, and especially that for all loss or damage occurring in the transit of said cotton the legal remedy shall be sought and held against the particular carrier only in whose custody the said cotton may be at the time of the happening thereof.

No. bales.	Marks.	Weights.
40	[N A] D W	20,000

In witness whereof the agent hath affirmed to 2 bills of lading of this tenor and date, one of which being accomplished the others *are* to stand void.

L. ECHOLS, *Agent.*

46 No. 104. Original.

To be delivered to shipper, East Alabama Railway Company.

LA FAYETTE, ALA., STATION, *Oct.* 10, 1883.

Received from Harrington Bros. fifty-five (55) bales of cotton, — of which are in bad order, all marked as stated below, and consigned to Nashua M'f'g Co., at Nashua, N. H., to be transported and delivered to W. R. R., at Opelika, at the rate of 92 — per 100 — through.

It is hereby agreed and distinctly understood that in consideration of the transportation of the said cotton at the above-mentioned rates the shipper releases the East Alabama Railway Co. from all liability for any loss or damage which may occur from the bursting of rope or bagging, old damage, or water while upon their railroad, and from any loss and damage whatever which may occur after delivery to any other railroad Co. or agent for transportation to ultimate destination.

No. bales.	Marks.	Condition.
55	[N A] D W	27,500

F't paid to Opelika.

W. N. BRAYAN, *Agent.*

[Written across the face:] From Opelika via Charleston.

47 *Cotton Bill of Lading.*

No. —. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

HOGANSVILLE, GA., STATION, *Oct.* 12, 1883.

Received of Harrington Bros. three (3) bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua M'f'g Co., at Nashua, N. H., upon payment of 95 — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be

responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight, mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery or any accidents of the seas, bays, sounds, or rivers or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
3	[N A W] D----------	1,500

In witness whereof the agent hath affirmed to — bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

FRANK WAY,
Agent for the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Charleston.

48 *Cotton Bill of Lading.*

No. —. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

HOGANSVILLE, GA., STATION, *Oct.* 18, 1883.

Received of Harrington Bros. twelve (12) bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua M'f'g Co., at Nashua, N. H., upon payment of 95 — per 100 lbs. or — per bale freight, and upon the following conditions, viz: Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight, mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jetti-

son, shipwreck, steam, fire, accident to boilers or machinery, or any accidents of the seas, bays, sounds, or rivers or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
12	[N A] D W	5,462

In witness whereof the agent hath affirmed to — bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

FRANK WAY,
Ag't for the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Charleston.

49 *Cotton Bill of Lading.*

No. 112. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

NEWMAN, GA., STATION, *Octo.* 18*th*, 1883.

Received of Harrington Bros. twelve (12) bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua M'f'g Co., at Nashua, N. H., upon payment of 95 cts. per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight, mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery, or any accidents of the seas, bays, sounds, or rivers or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance againt the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of

loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
11 $\frac{1}{12}$ b. c.	[N A] E W } [N A] D W } ----------	6,000 lbs.

In witness whereof the agent hath affirmed to 2 bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

GEO. W. RANNEY,
For the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Charleston, S. C.

50 *Cotton Bill of Lading.*

No. 22. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

GRANTVILLE, GA., STATION, *Oct.* 10, 1883.

Received of Harrington Bros. three bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto the Nashua M'f'g Co., at Nashua, N. H., upon payment of 95c. per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be

responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery or any accidents of the seas, bays, sounds, or rivers or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
3	[N A] D W	1,500

In witness whereof the agent hath affirmed to — bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

A. B. STEWERT,
For the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Charleston.

51 *Cotton Bill of Lading.*

No. 103. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

WEST POINT, GA., STATION, *Octo.* 17, 1883.

Received of Harrington Bros. twenty-eight (28) bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua M'f'g Co., at Nashua, N. H., upon payment of 92c. per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from

storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery, or any accidents of the seas, bays, sounds, or rivers or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
26 2 — 28	[N A] D W } [N A] E W } ----------	14,000

In witness whereof the agent hath affirmed to 2 bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

J. A. EWIN,
For the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill of lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Chas.

52 *Cotton Bill of Lading.*

No. 128. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

NEWMAN STATION, *Oct.* 22, 1883.

Received of Harrington Bros. eight bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua M'f'g Co., at Nashua, N. H., upon payment of 95 — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery, or any accidents of the seas, bays, sounds, or rivers or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any

legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk, or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
4 4	[N A] D W } [N A] E W } ----------	4,000

In witness whereof the agent hath affirmed to — bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

G. W. RANNEY,
For the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill — lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Chas.

53 *Cotton Bill of Lading.*

No. 86. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

WEST POINT, GA., STATION, *Octo.* 15, 1883.

Received of Harrington Bros. — bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and

West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua Mills, at Nashua, N. H., upon payment of 92c. per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery, or any accidents of the seas, bays, sounds, or rivers, or of steam or inland navigation, of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled

only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
27	[N A W] D ----------	13,500

In witness whereof the agent hath affirmed to 2 bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

J. A. EWIN,
Ag't for the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Chas.

54 *Cotton Bill of Lading.*

No. —. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

HOGANSVILLE, GA., STATION, *Oct.* 18, 1883.

Received of Harrington Bros. thirty-eight (38) bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua M'f'g Co., at Nashua, N. H., upon payment of 95 — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, virmin, explosion, floods, freshets, rust, loss in weight, mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea, or in port, or on cars, boat, vessel, or steamer; and in no

event will the said Atlanta & West Point Railroad Company or the companies constituting this line, or any one of them, be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery, or any accident of the seas, bays, sounds, or rivers, or of steam or inland navigation, of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation, whereby any legal liability may be incurred by the terms of this contract, that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
38	[N A] E. W.	19,000

In witness whereof the agent hath affirmed to — bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

FRANK WARD,
Ag't for the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill lading plainly on face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Charleston.

55 *Cotton Bill of Lading.*

No. 33. Form 4. Original.

Atlanta and West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

GRANTVILLE, GA., STATION, *Octo.* 19, 1883.

Received of Harrington Bros. fifty-six (56) bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua, M'f'g Co., at Nashua, N. H., upon payment of 95c. per 100 lbs. or — per bale freight, and upon the following conditions, viz: Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight, mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta
56 & West Point Railroad Company or the companies constituting this line or any one of them be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery, or any accidents of the seas, bays, sounds, or rivers, or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage, unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be in-

curred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the
57 amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
25 31 — 56	[N A] D W } [N A] E W } ----------	27,000

In witness whereof the agent hath affirmed to — bills of lading, all of this tenor and date, one of which being accomplished the other to stand void.

A. B. STEWARD,
For the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill lading plainly on the face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Charleston.

58 *Cotton Bill of Lading.*

No. 113. Form 4. Original.

Atlanta and West Point *Point* Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Ga.

WEST POINT STATION, *Oct.* 22, 1883.

Received of Harrington Bros. — bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta and

West Point Railroad Company and connecting lines and steamships (with liberty to compress) unto Nashua M'f'g Co., at Nashua, N. H., upon payment of 92c. per 100 lbs. or — per bale freight, and upon the following condition, viz:

Neither the Atlanta & West Point Railroad Company, the companies constituting the through line, or any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight, mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery, or be in depots, at stations, on wharves, or at sea, or in port, or on cars, boat, vessel, or
59 steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line, or any one of them, be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery, or any accidents of the seas, bays, sounds, or rivers, or of steam or inland navigation of whatever nature or kind, unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within 24 hours after the delivery of the cotton, and the amounts of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of the contract that the company alone shall be held responsible therefore in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said
60 cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to the value of said property at the place and time of shipment under this bill of lading. The delivery by any navigation company where it is the last carrier shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed. The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination are at the risk and expense of the owner. Loss or

damage claims for cotton carried under this bill of lading will be settled only on basis of weights hereon at invoice cost of such cotton.

Number bales.	Marks.	Weights.
14 7 — 21	[N A] D. W. [N A] E W	12,253

In witness whereof the agent hath affirmed to 2 bills of lading all of this tenor and date, one of which being accomplished the other to stand void.

J. A. ERVIN,
Ag't for the Parties in Interest Separately but not Jointly.

Agents must invariably enter the number of this bill — lading plainly on the face of way bills.

A. J. ORME,
General Freight Agent.

[Written across the face:] Via Charleston.

61 After hearing the testimony of C. D. Bateman, Abel M. Palmer, and Hutson Lee on behalf of the plaintiff and J. H. Averill, John B. Peck, P. J. Cochran, J. Cahill, and Robert Breese on behalf of the defendant and argument by counsel, the plaintiff, by its attorney, Mr. Nathans, prayed the court to instruct the jury, and the defendant, by its attorneys, Simonton and Barker, prayed the court to instruct the jury, which instructions of plaintiff and defendant and bill of exceptions of plaintiff are in the words and tenor following:

Plaintiff's Bill of Exceptions.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

THE NASHUA MANUFACTURING COMPANY, a Corporation under the Laws of New Hampshire, Plaintiff,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation under the Laws of South Carolina, Defendant.

62 The issues in said action came on for trial before the honorable the judges of the circuit court of the United States for the district of South Carolina.

A jury was called and sworn. The plaintiffs, to maintain the issues on their part, proved by Frederick Amory, treasurer of plain-

tiffs, that at the time of the burning of the cotton of plaintiffs in the yards of the defendant and in their custody there were 522 bales awaiting delivery by defendant to its next connecting carrier in course of transportation to plaintiffs at Nashua, New Hampshire; that 208 bales of said cotton were shipped from various points in Georgia and bills of lading delivered to the shipper, of which following form is a copy:

Cotton Bill of Lading.

"No. —. Form 4. Original.

Atlanta & West Point Railroad Company.

Cecil Gabbett, superintendent, Montgomery, Ala.; A. J. Orme, general freight agent, Atlanta, Georgia.

STATION ——, 188–.

Received of —— —— — bales of cotton, marked, numbered, and weighing as below, to be transported by the Atlanta & West Point Railroad Company and connecting lines and steamships
63 (with liberty to compress) unto ——, at ——, upon payment of — per 100 lbs. or — per bale freight, and upon the following conditions, viz:

Neither the Atlanta and West Point Railroad Company, the companies constituting the through line, nor any one of them will be responsible for loss or damage, delay or detention, arising from the act of God, public enemies, mobs, riots, insurrections, pirates, robbers, thieves, restraints of rulers, princes, or people, civil or military authority, sweating, leakage, breakage, storage, contact with other goods, the effect of heat and cold, dampness, dirt, wet, vermin, explosion, floods, freshets, rust, loss in weight mending, fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the company or companies, their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots at stations, on wharves, or at sea or in port or on cars, boat, vessel, or steamer; and in no event will the said Atlanta & West Point Railroad Company or the companies constituting this line or any one of them
64 be responsible for loss or damage, delay or detention, arising from storms, ice, collision, jettison, shipwreck, steam, fire, accident to boilers or machinery or any accidents of the seas, bays, sounds, or rivers or of steam or inland navigation of whatever nature or kind unless a special receipt be taken therefor and a charge of — per cent. on the value of the article or articles be paid prior to the shipment of the same for insurance against the above-named risk; and neither the said companies constituting this line nor any of them will be liable for any loss or damage unless the claim be made in writing within twenty-four hours after the delivery of the cotton, and the amount of such loss or damage must be adjusted in the presence of an officer of the line before the same be removed from the company's warehouse or station at destination; and it is

further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred by the terms of this contract that the company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the company incurring
65 such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton; and it is further agreed that the amount of loss or damage so accruing shall be computed with reference to value of said property at the place and time of shipment under this bill of lading.

The delivery by any navigation company, where it is the last carrier, shall be at its wharf, and, at its option, if not removed during the day of their arrival, they may be stored at owner's expense and risk or be permitted to lie where landed.

The steamers of the companies of this line are at liberty to touch at any port or ports, to tow and assist vessels in all situations, and to sail with or without pilots. All articles of freight on arrival at place of destination *or* at the risk and expense of the owner.

Loss or damage claims for cotton carried under this bill of lading will be settled only on basis of weights entered hereon at invoice cost of such cotton."

That 314 bales were shipped from points in Alabama and bills of lading delivered therefor, of which the following forms a copy:

"No. 31. Original.

66 The Southern Freight Line via The Western Railroad of Alabama and Georgia Railroad.

OPELIKA, ALA., *Oct. 8th*, 1883.

Received from Harrington Brothers — bales of cotton consigned to Nashua Man'f'g Co., at Nashua, New Hampshire, marked and numbered as below, to be transported (with the privilege of compressing) by the Western Railroad of Alabama to the freight station at its terminus, and there to be delivered to such company or carrier whose line may be considered a part of the route to destination, and at destination to be delivered to consignee *about* payment of 92 — per hundred pounds freight and charges advanced by this road.

In consideration that the cotton herein described is transported at reduced rates, it is mutually agreed, understood, and enacted, as a contract between the shipper and the Western Railroad of Alabama, that since said cotton must pass through the custody of several carriers to the place of ultimate destination the exceptions from liability made by such carriers, respectively, shall operate in the
67 carriage by them, respectively, of said cotton as though herein inserted at length; and, especially, that for all loss and damage occurring in the transit of said cotton the legal remedy shall be sought and held against the particular carrier only in whose custody the said cotton may be at the time of the happening thereof.

No. bales.	Marks.	Weights.

In witness whereof the agent hath affirmed to 2 bills of lading of this tenor and date, one of which being accomplished the others *are* to stand void."

That of said 522 bales 274 were burnt in the yards of the defendant on the 29th of October, 1883; that 248 bales arrived at the mills of the plaintiffs; that plaintiffs could not tell how many bales belonging to each of the two forms of bills of lading were burnt, but at least 166 bales of the short bills of lading cotton were burnt; that plaintiffs received the following letter from the defendant after the fire:

OFFICE FREIGHT AGENT SOUTH CAROLINA R'Y CO.

Respectfully: These brands coming from La Fayette, Opelika, Ala.,
Hogansville and Grantsville, Georgia, it was impossible after
68 the fire to be able to state what shipments were lost and what
saved, as all were mixed together. The total number lost,
274, is correct.

(Signed) C. D. BATEMAN, *Ag't.*

That at least 166 bales of the short bills of lading cotton were burnt, and that the plaintiffs accepted payment therefor from the defendant without prejudice to their right to insist that the entire cotton burnt was shipped under said short bills; that they had insurance on said cotton in solvent companies, but that no part thereof has been paid, and the said companies denied their liability and plaintiffs have brought suit against them; that witness has no knowledge of any defense to the claim of plaintiffs on part of the insurance companies.

Question. Have you made any offer of settlement to said railroad; and, if so, what?

Answer. I have offered to allow them to take this suit, that offer not to prejudice our claim against them.

Q. Was that offer accepted?

A. No.

Plaintiffs never authorized their agent to take bills of lading with the benefit of insurance clause; never knew of such clause until after this fire in the yards of the South Carolina Railroad Company.

69 Witness, on cross-examination:

Q. This condition (the insurance clause) was not an uncommon one?

Ans. No.

Q. Have you ever told this R. R. that your agents had no authority to assent to that condition?

Ans. Never told the railroad anything.

That value of cotton burnt is $51.34 per bale.

C. D. BATEMAN, witness for plaintiff, testified that he is agent for South Carolina Railway Company at Charleston, in charge of the cotton transportation department; that the railway company had a contract with the New York and Charleston Steamship Company for transportation of cotton, of which the following is a copy:

"Agreement entered into this first day of September, 1883, between the New York and Charleston Steamship Company and the New York and South Carolina Steamship Line, of the first part, and the South Carolina Railway Company (for themselves and their connections), of the second part.

First. The parties of the first part agree to place at the disposal of the party of the second part upon the conditions hereinafter named the following capacity of their respective steamers
70 (while running on the Charleston Line) for cotton and other freight has represented in compressed cotton, viz:

The S. S. City of Columbia, 2,000 bales; the S. S. City of Atlanta, 1,750 bales; the S. S. City of Delaware, 1,875 bales; the S. S. Gulf Stream, 1,200 bales, being capacity equivalent to a total of 6,825 bales of compressed cotton in the four steamships, it being understood that compressed cotton shall be estimated as occupying sixty (60) per cent. of the room of uncompressed cotton.

Second. The South Carolina Railway Company agree to notify the agent of the Wednesday ships before noon of Monday preceeding the day of sailing and the agent of the Saturday ships before noon of Thursday preceeding the day of sailing how much of the allotted room they will require (specifying the number of bales of compressed and uncompressed cotton or space required for other freight), and for all space thus engaged by the railway company and not used by them they agree to pay the steamship company for on the basis of seventy-five cents per bale of compressed cotton.

Third. This agreement shall take effect immediately and
71 continue in force during the cotton season of 1883 and 1884."

Q. Was there a large lot of cotton accumulated there?

A. Yes, sir.

Q. How much?

A. About 4,000 bales.

Q. How long had that block been carrying in there, faster than steamship company made their trips?

A. I cannot say exactly; two or three weeks; but I don't mean to say that any of the cotton laid there two or three weeks, but that it had been accumulating two or three weeks.

Q. Did you or the South Carolina Railway Company give notice to the Atlanta & West Point railroad and other roads shipping cotton down the South Carolina railroad that there was a block in the yard, to not ship any more down?

A. I did not.
Q. Did any officer of the company?
A. I do not know.
Q. That was your department?
A. Yes, sir.

That the cotton was sent by drays from the yard of the company to the wharves of the steamships, and that the South
72 Carolina railway paid for the same. It was part of the line. Witness can hardly be able to say where the responsibility comes in; that no special tender of the plaintiffs' cotton had been made to the steamships; it came — its regular order; that witness always notifies them how much was for them. If the steamship company took two thousand bales you would notify them that there was four thousand bales, and if they wanted to take more they could. The cotton was kept in the uncovered yards of the defendants. They sometimes had special shipments that had to be hurried.

On cross-examination witness testified that as to the block of cotton referred to there was not in the yard any unusual amount of cotton for that time of the year; that the railway company always has that amount in that season of the year.

Question. Is the fact that the road had contract with the steamship company to take cotton away for points North advertised?

Answer. I think so. The notice that I send them shows how much cotton was carried each month.

Q. I mean the other arrangement; was not that a matter of public notice?
A. I do not know, as I have never seen it.
Q. Generally railroads advertise their rates, &c.?
A. Yes, sir.
73 Q. Was there any exception in the South Carolina Railway Company?
A. None that I know of.
Q. Was the Charleston steamships advertised in the paper?
A. Yes, sir.

The cotton in the yards of the railway company was guarded by watchmen and with buckets of water distributed through the yards. All the railroads in the city and all the roads witness knows of follow the general practice of putting cotton in the open yard and not in shed. The railroads doing the business of carrying cotton to any extent could furnish fire-proof warehouses for storage of the cotton, but whether it would pay, witness thinks not; hardly thinks they could carry on the business; it is not usual; knows of no large corporation doing it. The yard in which this cotton was stored is surrounded by high fences closed in; every precaution is taken. Witness knows of no precaution omitted in regard to this cotton on the part of the railway company or any of its agents. Under the arrangement of the railway company with the steamship company the agreement of the railway company is to notify
74 the ship, and it was witness' duty to give this notice. Witness,

previous to the fire, did give this notice. There was nothing in that agreement which limited the amount of cotton if they had room in the steamship for more and the ships had frequently taken more. The cotton in the yard was marked, and each section was marked and taken out in the order that it came in, if possible. The railway company had clerks who attended to that, and the draymen had men who looked after it also. There was reference to the time that the cotton had been in the yard—as to which went to the wharf first; but the railway company has had special shipments that had to be hurried.

ABEL PALMER, examined for the plaintiffs, testified that he was a watchman in the yard at the time of the fire; that the fire broke out on the edge of a bale of cotton near the top, within fifty feet of the track, along which an engine and train of the defendant had passed about five or six minutes before; that the wind was blowing very strong across the track along which the engine passed and in the direction of the cotton where fire broke out; that no cotton had been unloaded within two hours of the time of the fire, which
75 was between 12 and 1 p. m., but the hands had been employed unloading cotton from cars at or near that part of the yard and track; that the hands in his yard had knocked off and were not present in the yard at that time, and there was no other watchman exactly in the yard in which witness was but himself when the fire occurred, but there was a watchman named Breese stationed where he could see better than witness could; that if there had been a sufficient force of men present when he first saw the fire it might have been extinguished or the burning bale removed so as to prevent its communicating fire to the rest; it might have been done, but cannot say positively, the wind was so strong; that on the opposite side of the street was another uncovered yard of the defendant, and that Breese, a watchman, was on top of car in the yard, overlooking both; that on the day previous to the fire and on the morning of the fire C. D. Bateman, the agent of the defendant, while passing through the yard, told witness to distribute buckets of water on the cotton bales, and he changed the position of four buckets on bales in different parts of the cotton yard; that the buckets
76 were larger than the ordinary size water-buckets—a little extra size.

The defendant, to maintain the issue on its part, examined J. Averill, master of transportation of the South Carolina railway, who testified that he had been in that employment since the South Carolina railroad was put in the hands of a receiver; before that had been in the employment of the Baltimore & Ohio R. R. Co., and formerly with the South Carolina Railroad Company; his special duty was to look after trains, in transportation of freight and passengers, &c.; the usual mode of stowing cotton by the railways and railroad companies at terminal points on their roads is to unload it in yards; knows of no company doing the business of the capacity of the South Carolina railroad which undertakes to provide fireproof warehouses; does not think it would be practicable of any

other roads in the South with their facilities, nor could they do their business if they undertook to provide fire-proof warehouses; the South Carolina Railroad Company has taken every precaution it could in regard to cotton stowed in its yards—by employment during the cotton season of additional watchmen, by the opening and keeping in order of fire-wells in each yard, by the distribution of buckets of water at different points in the yard, and by
77 having the labor forces well organized, so that under ordinary circumstances it had every facility it could have within reason. The precautions observed as regards the engines on the tracks traversing the yards are that the engines are provided with the most improved spark arresters. These are required to be kept in order and the dampers on the ash pan closed. Those are the two main precautions. Every engine has to be inspected every time it comes into the round house. The arrangement for arresting sparks has, since 1875, given satisfaction. The company has hauled thousands of bales in open cars and have never had a bale burned except in the latter part of 1879, which occurred at a point in the road about 13 miles from Charleston with an engine that had not been overhauled. The only engine in the yard witness ever heard of showing any spark was one that the yard-master reported, and stated to witness that he had sent to the shop as soon as he discovered that the arrester was in bad order. The principal features about the spark arrester is the bell inside of the stack that breaks up the cinder and then a net that keeps it from coming out. It is possible for that net to wear out, but if it wears out it is possible to
78 repair it. The master machinist (Mr. Cochran) is the person under the organization of the South Carolina Railway Company in charge of these smoke-stacks.

Defendant next examined John B. Peck, the general manager of the South Carolina Railway Company, who testified that he had been the general manager since November 1879; had been employed on railroads since 1856; had been employed on the Georgia, Atlanta & West Point, Atlanta & Western, and Richmond & Danville roads, and has had experience on all. In his experience on railroads in the business of moving cotton on large roads it is the invariable practice to stow cotton in open yards. Witness knows of no railroad doing a large business that undertakes to stow cotton in warehouses; does not think it would be practicable for large transportation companies to provide such precautions against fires. The precautions observed by the South Carolina Railway Company to protect cotton in open yards against fire are watchmen & water. The cotton in the railway companies, Oct. 29th, 1883, was protected within the line of reasonable protection. Witness knows of no usual precaution being omitted by the railway company in reference
79 to that cotton; was in the yard ten minutes after cotton had taken fire, but does not know how fire originated. Cotton in yards is very combustible. In this instance fire spread very rapidly, and in ten to twenty minutes two thousand bales of cotton were on fire. The course of business was that cotton consigned as this was — conveyed between the road and ship by a transfer company, which

is a distinct line in the link and makes a separate charge for its services.

Upon cross-examination witness testified that cotton does not ignite of itself, so far as he knew; that all lines interested in the shipment paid the transfer company. These were the Atlanta & West Point, the Georgia & the South Carolina Railway Companies. Payment was made through the South Carolina Railway Company. Our contract was to deliver to transfer company. The present transfer company was organized March, 1883. Witness is the general manager of the corporation; the South Carolina Railway Company is one of the constituents of the company; does not know who else compose it. His position as manager of the transfer company grows out of his position as manager of the South Carolina Railway Company.

That the cotton damaged from the fire was sold by the South Carolina Railway Co. and the proceeds are in its treasury; that the South Carolina Railway Company has paid nothing of
80 this money to the plaintiff's company. Had insurance on cotton to protect themselves from loss.

P. J. COCHRAN testified: Has been master of machinery for the South Carolina Railway Company since 1879, and before that of various other railroad companies. It is usual for railroad companies moving large quantities of cotton to store it in yards. Business could not be handled well if cotton was stored in warehouses. Engines on South Carolina railway have spark arresters adapted for engines burning wood. The engine in the yard about the time this fire occurred was number 52. It had a new smoke-stack and had been inspected and found in good order. All the yard engines were in perfect order. No. 52 was examined the day of the fire.

Cross-examined:

Does not mean to say it was an absolute impossibility for a spark to escape. Company uses the best arresters. It is impossible for sparks to pass through the perforated sheet. Has never seen them pass through, but would not say anything — impossible.

J. R. CAHILL testified: Has been foreman of the boiler shop of the South Carolina Railway Company for twenty years. His duty is to examine the stacks of all the company's engines. Yard en-
81 gines are examined every day. Nos. 18 and 52 were in use 29th October, 1883. They were inspected that day; never knew of sparks getting through the arresters. Cotton is hauled on open cars just behind the engine and not one bale has been burned; that he is the inventor of this spark arrester.

Cross-examined:

Does not know origin of fire in round house day before. It was not the engine; do not make sparks.

Mr. BREESE testified: Was on duty as watchman in the yard the day the fire occurred; was on a car not more than 100 feet from where

the fire occurred. I saw the fire before the alarm bell struck. I saw smoke, then some sparks; fire spread very rapidly. Fire broke out 25 or 30 feet from railroad track. Cotton was all over the yard.

Cross-examined:

Fire was in yard 4 and witness was in yard three, across Mary street; does not know whether he or Moffit first gave the alarm. I jumped off the car and as I got to the yard the fire was more than half way across to Meeting street.

J. B. Peck recalled and the following documentary evidence put in by defendant: First, letter from R. H. Gardiner, Jr., to John B. Peck, manager of South Carolina Railway Company, as follows:

82 EXHIBIT D.

Office of Robert H. Gardner, Jr., counsellor-at-law, No. 40 State street.

BOSTON, *April* 21, 1884.

Col. John B. Peck, gen. manager So. Carolina R. R., Charleston, So. Ca.

DEAR SIR: Your favors of the 18th ult. and 17th inst. with regard to the claim of the Nashua M'f'g Co. against your R. R. were duly received. Without in any way receding from the position taken in my letter to you of March 13th, that if the R. R. claims any exemption from liability the burden lies on it to make out the exemption and prove to what number of bales it applies and without prejudice to our claim, I am willing to make the following statement, which is as accurate as possible under the circumstances:

There were shipped in all to us, just before this fire, 690 bales; of these were shipped via Savannah and arrived at our mills, 168; number of bales exposed to the fire in the yards of your R. R., 522. Owing to the confusion caused by the fire, to our not hearing at once from your R. R. that there would be any difficulty about payment, and to the destruction of the shipping marks, we had used up some
83 bales (63) before trying to identify them, and we have not yet succeeded in identifying all the others, and I can at present make only this statement as to bales which we have positively identified:

Of the cotton shipped via Savannah we have identified	122
" " " " " West & East Ala. R. R. "	100
" " " " " Atlanta & West Point R. R. we have identified	100
	322
There were burned in your yards	274
No. of bales rec'd but not identified as shipped under any particular b. l.	94
	690

You will observe that there were shipped via Savannah 168 bales
But we have identified only 122

Balance 46

Deducting this balance from the above number (94) of bales received but not identified, we have left 48 bales which were received by us via Charleston, but by which R. R. they were shipped we do not yet know. Assuming that they were all shipped by the Western R. R. of Ala. (that being the most favorable supposition for your R. R.), we have received 148 out of the above 314 shipped, and the difference, or 166 bales, is the least possible number of bales burned which were shipped under b. l. not containing the clause your R. R. rests on, and therefore the least possible number to which your offer of the 17th inst. applies. Thus the account stands—

Total number shipped to us		690 bales
Shipped via Savannah, all of which arrived at the mills	168	
Shipped via East & West Ala. R. R. and arrived at the mills	148	
Shipped via Atlanta & West Point R. R. and arrived at the mills	100	
Shipped via East or West Ala. R. R. & burned at Charleston	166	
Shipped via Atlanta & West Point R. R. & burned at Charleston	108	
	274	
	690	"

84 The average cost per bale of the whole amount shipped (except an invoice of 50 bales which can be separated from the others as shipped via Savannah), or 640 bales, is $51.339, and the smallest amount for which your R. R. is liable to us is, therefore, 166 bales, @ $51.339 or $8,522.27, which is about ⅘ of our total claim.

I do not wish to be understood as in any manner waiving our claim that your R. R. is liable to us for the whole loss. The b. l. on which your R. R. declines to pay were all issued in the State of Georgia by the Atlanta & West Point R. R., and it is well settled in Georgia that a common carrier cannot limit his common-law liability, which is that of an insurer, except by a special contract. Fish *v.* Chapman, 2 Ga. 349, and this rule was adopted in the Rev. Code of Georgia of 1882, § 2068, and further that the acceptance of b. l. containing clauses for the benefit of the carrier does not constitute a contract between shipper and carrier. Southern Express Co. *v.* Newby, 36 Ga., 635.

I trust, therefore, that in reconsideration your R. R. will decide to pay us the whole amount of our claim at once and not drive us to institute hostile proceedings.

I am, very truly yours,

ROBERT H. GARDINER, JR.

Endorsed: In evidence. Exhibit D. Ap'l 18, 1885. J. E. Hagood, C. C. C. U. S., dist. S. C.

85 The following letter, marked—

EXHIBIT E.

Office of Robert H. Gardiner, Jr., counsellor-at-law, No. 40 State street.

BOSTON, *June* 2, 1884.

DEAR SIR: I enclose the receipt of the Nashua M'f'g Co. for the $8,522.27 sent by the South Carolina R. R. I have added to the receipt the words "or claim for interest," in order to leave that question open between us and because we intend to demand interest from our insurers and do not wish to prejudice their right to claim it from you.

We are much obliged for your promptness and courtesy in settling so much of our claim, and only wish you could see your way clear to paying the rest.

Thanking you personally for the kind attention you have given my letters, I remain, very truly,

ROBERT H. GARDINER, JR.

Col. John B. Peck, South Carolina R. R., Charleston, So. Car.

86 Also the following receipt:

(Copy.)

The South Carolina R'y Company to the Nashua M'f'g Co., Dr.

To 166 bales cotton, shipped by the Western R. R. of Alabama and the East Alabama R. R. and burned in the yards of the South Carolina Railway Company, at $51.339 per bale ---------- $8,522 27

Received payment, without waiving claim for balance of bales burned in said yards or claim for interest.

Boston, May 30th, 1884.

(Signed) FREDERICK AMORY,
Treas'r Nashua M'f'g Co.

(Endorsed:) In Evidence. Exhibit E. Ap'l 18, 1885. J. E. Hagood, C. C. C. U. S., dist. S. C.

Also following letters:

87 EXHIBIT B.

J. N. Nathans, attorney and counsellor at law.

CHARLESTON, S. C., *July* 24, 1884.

Col. J. B. Peck, gen'l manager.

D'R SIR: I enclose you communication from att'y of Nashua & Jackson Co., which he has requested me to hand you. Please address your reply to him through me.

Yours, &c., J. N. NATHANS.

Office of Robert H. Gardiner, Jr., counsellor-at-law, No. 40 State street.

BOSTON, *July* 22, 1884.

Col. John B. Peck, gen. manager So. Carolina R. R., Charleston, So. Car.

DEAR SIR: I write, without intending in any way to waive my claim stated in previous letters to you, that the R. R. must
88 show by positive proof that all or any part of the 108 bales Nashua cotton still unpaid for, and of the Jackson Co. cotton, none of which has been paid for, were shipped under benefit of insurance b. l., and that the R. R. is entitled to the benefit of such insurance, if even only so far as such proof goes, and I do not admit that any of these 108 bales Nashua or any of the Jackson Co. were shipped under such bills, which I understand your R. R. still asserts.

The American & Boyleston Ins. Co.'s having definitely taken the position that their policies of insurance were avoided by our acceptance, as they allege, of b. l. containing a clause purporting to give the benefit of insurance to the carrier, my clients, the Nashua & Jackson Co.'s brought suit on their policies for cotton burned while in the custody of your R. R.

The suits were entered in April last and may be marked for trial in September. These suits also cover claims for cotton burned at Norfolk in the custody of the Norfolk & Western R. R.

We now propose to give your R. R. & the Norfolk R. R. control of these suits, or, in case only one R. R. accepts this offer, we will admit as associate counsel any proper person such R. R. may
89 designate on receiving from each R. R. accepting this offer payment in full of the amount of our claim against the carrier, with costs and interest from date of fire; and, in case of our relinquishing control of the suits, we should require satisfactory assurance of our receiving the difference, if any, between the amount of our claim under the b. & l. and the amount recovered under the policies, the cotton being valued in the policies at $55 & $65 per bale.

Your answer to this proposition we shall consider final, and we shall consider ourselves at liberty if you refuse it to take any course of action that may seem most to our advantage, though it may prevent your subsequent subrogation to our rights if such a right of subrogation is established.

If you accept the offer we shall, of course, be happy to give you any reasonable assistance in our power.

Very truly yours,

ROBERT H. GARDINER, JR.

(Endorsed:) Exhibit B. In evidence Ap'l 17, 1885. J. E. Hagood, C. C. C. U. S., dist. S. C.

90 EXHIBIT C.

The South Carolina Railway Co.. John B. Peck, general manager.

CHARLESTON, *August* 6, 1884.

Robert H. Gardiner, Jr., Esq., Boston, Mass.

DEAR SIR: Your favor — 22 ult. has been received through J. N. Nathans, Esq., of this city, through whom I send this reply. I have considered your proposals respecting certain suits brought by your clients, the Nashua & Jackson Co.'s, against the American & Bolyeston Insurance Companies. Your offer to turn these suits over to the So. Ca. Railway Co. and the Norfolk & Western R. R. Co. or to either of these companies, upon certain conditions, is declined by this company.

Yours respectfully,

(Signed) JOHN B. PECK,
Gen. Manager.

(Endorsed:) In evidence. C. Filed 17 Ap'l, 1885. J. E. Hagood. C. C. C. U. S., dist. S. C.

91 Witness did not, as he remembers, receive any offer from the plaintiffs as to the insurance held by them, except that contained in Mr. Gardiner's letter.

Plaintiffs in reply examined Hutson Lee, who testified that he is an insurance agent in Charleston and a member of the Southeastern Tariff Association. In standard warehouses insurance on cotton is 1½ per cent.; in road yards 4½ per c't.; difference is on account of extra hazard on account of engines, &c.

The testimony being then closed, the plaintiffs requested the court to charge.

Separate Instructions Prayed by Plaintiffs.

NASHUA MANUFACTURING CO.
vs.
THE SOUTH CAROLINA RAILWAY CO.

That the burden of proof is upon the defendant to show that the cotton of the plaintiffs destroyed by fire was cotton included in bills of lading giving the carrier the exemption therefor unless negligent, and giving, also, the benefit of insurance, and in the absence
92 of such proof the plaintiffs are entitled to recover; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL]
C't Judge.

And plaintiffs prayed the court to instruct the jury that the assent of the shipper to the contract contained in a bill of lading is necessary, and that its mere delivery to the shipper is not evidence of

such assent; but the court refused said instruction, and plaintiffs then and there, before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

93 And the plaintiffs prayed the court to instruct the jury that the law of Georgia, where the bills of lading in this case were issued, impose the common-law liability upon carriers, unless a special contract is proved, and that mere delivery of the bills of lading to the shipper or his agent is not evidence of such contract, and that if the jury find that the plaintiffs or their duly authorized agent did not expressly assent to the terms of the contract contained in the bills of lading issued to plaintiffs by the Atlanta & West Point Railroad Company they cannot claim the benefit of plaintiffs' insurance, if any, or exemption on account of fire; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

94 And plaintiffs prayed the court to instruct the jury that if the bills of lading issued to the plaintiffs or their agent by the Atlanta & West Point Railroad Company were so delivered as to constitute the contract between the plaintiffs and the company for the transportation of the cotton, then the stipulation in the same giving the carrier the benefit of the shipper's insurance is unreasonable, contrary to public policy and the legal duties and obligations of carriers, and therefore void; but the court refused said instruction, and the plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And the plaintiffs prayed the court to instruct the jury that to give the carrier the benefit of insurance it must be liable to shipper for loss; liability must exist as a prerequisite to a claim to the insurance, and while carrier denies this liability he cannot claim benefit of insurance; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

95 And plaintiffs prayed the court to instruct the jury that if the stipulations in the bills of lading under which the plain-

tiff's cotton was agreed to be transported by the Atlanta & West Point railroad and its connecting lines giving the carrier the benefit of the shipper's insurance is valid, then it only entitles carrier to the policy, as it is in the hands of the shipper or owner at the time of loss or damage, and if said policy is void or unproductive this is no defense to the carrier as against the shipper or owner; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that there is no legal obligation from such stipulation that shipper- shall effect valid insurance, and that if such insurance is invalid this is no
96 defense in an action by the shipper against the carrier; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that the shipper may insure or not, as he pleases; if he does insure, the carrier takes such insurance with all its infirmities, and cannot defend against shipper by reason thereof; but the court refused said instructions, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And the plaintiffs prayed the court to instruct the jury that the carrier does not lose his character as carrier by reason of the stipulation in the bill of lading that he shall have the benefit of
97 any insurance effected by the shipper, and that he is primarily liable as carrier to the shipper for loss or damage, if not arising from exemptions under the law or his contract; but the court refused said instruction, and plaintiffs then and there and before the jury had withdrawn from the bar did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that if the carrier desires the benefit of the shipper's insurance under the stipulations in the bills of lading giving him the benefit of the shipper's insurance he must first pay the loss, unless the shipper has already been paid by his insurer, and that if the plaintiffs have not so been

paid they are entitled to recover the amount of their loss from the defendant; but the court refused said instruction, and plaintiffs then and there and before the jury had withdrawn from the bar did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

98 HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that the bills of lading issued by the Atlanta & West Point railroad reserved the benefit of insurance to the carrier in the event of a liability under the terms of the contract therein only, and that such reservation does not apply to a liability arising under the statutory law of South Carolina and independent of such contract; but the court refused said instruction, and plaintiffs then and there and before the jury had withdrawn from the bar did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that negligence is that want of care which, under all the circumstances, the situation demands, and that if the jury find that the plaintiffs' cotton was burned because of the absence of such care, as under the cir-
99 cumstances was required of the defendant, the plaintiffs are entitled to recover; but the court refused said instruction, and plaintiffs then and there and before the jury had withdrawn from the bar did except to said refusal and prayed the court to sign and seal said instruction, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that if the jury find that the defendant knew, at a period anterior to receipt of plaintiffs' cotton by Atlanta & West Point railroad, that its succeeding carrier could not transport the cotton of the plaintiff because of its arrangement with the steamboat company, and that such cotton would thus accumulate in its uncovered yards in close proximity to its passing trains, and fail to give notice to the Atlanta & West Point railroad thereof, then the defendant is not entitled to the exemptions of the bills of lading in this case; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed
100 the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that if the jury find from the evidence that the danger of destruction from fire to plaintiffs' cotton was increased by the accumulation of large quantities of cotton in defendant's uncovered yards, then it was the

duty of the defendant to proportion its care to such increased danger, and its failure so to do is negligence, for which it is liable to plaintiffs; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And the plaintiffs prayed the court to instruct the jury that it is the duty of a carrier to warehouse or otherwise suitably provide for the security of property in his custody awaiting delivery to a connecting carrier, and that if the jury find that the exposure
101 of the plaintiffs' cotton in the uncovered yard of the defendant contributed to or increased the risk of its destruction by fire, then the defendant was guilty of negligence, and plaintiffs are entitled to recover; but the court refused said instruction, and plaintiffs then and there, and before the jury had withdrawn from the bar, did except to said refusal and prayed the court to sign and seal said exceptions, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

And plaintiffs prayed the court to instruct the jury that if the jury find that the fire which destroyed the cotton of the plaintiffs was communicated from the engines of the defendant, then under sec. 1511 of the revised statutes of South Carolina the defendants are liable, independent of any question of negligence, and the plaintiffs are entitled to recover; but the court refused said instruction, and plaintiffs then and there and before the jury had withdrawn from the bar did except to said refusal and prayed the court to sign and seal said exception, which is accordingly done.

HUGH L. BOND, [SEAL.]
C't Judge.

102 The defendant prayed the court for the following instructions:

Defendant's Request to Charge.

I.

That the bill or bills of lading under which the cotton of plaintiffs in this case was transported by the defendant constitutes the contract of the parties, and the plaintiffs are bound by the stipulation that the defendant company "shall have the benefit of any insurance that may have been effected upon or on account of said cotton."

HUGH L. BOND, [SEAL.]
C't Judge.

II.

The plaintiffs, before they can recover against defendant here, must show that they have performed their part of this contract by

proving that they have given to the South Carolina Railway Company the benefit of the insurance or that they have been ready to perform their contract by tendering such benefit to defendant without condition or qualification, and the same was refused.

103 III.

That the offer contained in the letter of R. H. Gardiner, attorney of plaintiff, July 22d, 1884, is not such performance of his part of the contract by the plaintiff as defendant was entitled and plaintiffs cannot, therefore, recover.

IV.

That the plaintiff cannot recover from the South Carolina Railway Company unless it has first given to that company credit for the amount of the insurance effected by plaintiff or accounted for the same.

V.

Unless the jury find that the loss is proved to have occurred from the fraud or negligence of the defendant company they must find for defendant.

VI.

That before the jury can find that the loss occurred from the negligence of the company they must find that the loss occurred from the failure of the company to take some precaution or to do some act which was reasonable and proper under the circumstances.

104 VII.

That in determining the interpretation of a contract for carriage the law of a carrier's principal office is to prevail.

And the presiding judge, being the circuit judge, granted the instructions so prayed for by the defendant and adopted them as the charge of the court to the jury. Whereupon the counsel for the plaintiffs, before the jury had withdrawn from the bar, did except to each and every one of said instructions so granted and charged.

The case was then submitted to the jury. The jury found a verdict for the defendant. Wherefore the said plaintiff prayed the honorable the judges of the said court to sign and seal their foregoing bill of exceptions, which is accordingly done this 18 day of April, 1885.

HUGH L. BOND, [SEAL.]
C't Judge.

105 And on the 25th day of April A. D. 1885, came into court the plaintiff, The Nashua Manufacturing Company, by its attorney, J. N. Nathans, and obtained the following order for writ of error and allowance of appeal, which order is in the words and tenor following:

Order.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In Circuit Court.

THE NASHUA MANUFACTURING COMPANY, a Corporation under the Laws of New Hampshire, Plaintiffs,

against

THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation under the Laws of South Carolina, Defendant.

The plaintiffs' exceptions in this case having been signed and sealed by the judges of this court, and the plaintiffs having
106 in open court prayed that their writ of error should be allowed, that the errors of law should be corrected and set aside in the Supreme Court of the United States:

It is now ordered that the prayer of the plaintiffs be granted and the writ allowed upon the plaintiffs entering and executing bond, with good sureties, to be approved by the judges of this court in the sum of two hundred and fifty dollars, to answer all damages and costs if the said writ shall be adjudged against said plaintiffs.

It is further ordered that, the plaintiffs entering into and executing said bond, the same shall be, when approved by the judges of this court, a supersedeas of the judgment in this case.

Ap'l 25, 1885.

HUGH L. BOND,
C't Judge.

107 And on the 27th day of April, A. D. 1885, came into court the defendant, The South Carolina Railway Company, by its attorneys, Simonton and Barker, and filed the following judgment, which judgment is in the words and tenor following:

Judgment.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

THE NASHUA MANUFACTURING COMPANY, Plaintiff,

against

THE SOUTH CAROLINA RAILWAY COMPANY, Defendant.

This action having been brought to a trial at a circuit court held on the eighteenth day of April, A. D. 1885, and a verdict for the

defendant having been rendered therein by the jury, costs having been adjudged at ninety-five dollars:

Now, on motion of Simonton & Barker, attorneys for said
108 defendant, it is adjudged that the South Carolina Railway Company recover of said Nashua Manufacturing Company ninety-five dollars costs.

SIMONTON & BARKER,
Defendant's Attorneys.

Taxed costs, signed judgment & execution Ap'l 27th, 1885.
[SEAL.] J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

And on the 27th day of April, A. D. 1885, came into court the defendant, The South Carolina Railway Company, by its attorneys, Simonton and Barker, and issued the following execution, which execution is in the words and tenor following:

Execution.

THE UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

In the Circuit Court.

To T. J. Tuomey, Esquire, United States marshal, or his lawful deputies, Greeting:

109 Whereas judgment was rendered on the eighteenth day of April, one thousand eight hundred and eighty-five, in an action in the circuit court of the United States for the district of South Carolina between the Nashua Manufacturing Company, plaintiffs, and the South Carolina Railway Company, defendant, in favor of said defendant against the said plaintiff, for the sum of ninety-five dollars, costs and charges therein, as appears to us by the judgment roll filed in the office of the clerk of the said court; and

Whereas the sum of ninety-five dollars, costs and charges aforesaid, *are* now actually due thereon:

Therefore we command you that you satisfy the said judgment out of the personal property of the said judgment debtor within your district, or, if sufficient personal property cannot be found, then out of the real property in your district belonging to such judgment debtor, on the day when the said judgment was so docketted in your district or at any time thereafter, in whose hands soever the same may be, and duly return this execution, according to law, to the clerk of the said court, at Charleston, S. C.

Witness Hon. Morrison R. Waite, Chief Justice of the
110 United States, at Charleston, S. C., the twenty-seventh day of April, one thousand eight hundred and eighty-five.

SIMONTON & BARKER,
Def'd't's Attorneys.

[SEAL.] J. E. HAGOOD,
C. C. C. U. S. for Dist. S. C.

Statement.

Amount of judgment	$
Interest	
Costs:	
Attorney	$22 50
Clerks	18 50
Marshal	
Com. Merwin	10 00
Witnesses	44 00
	$95 00

(Endorsements:) T. J. Tuomey, U. S. marshal for said district: Levy and collect $95, with interest from the — day of ——, besides your fees, &c. Simonton & Barker, attorneys for judgment creditor.

111 And on the 25th day of April, A. D. 1885, came into court the plaintiff, The Nashua Manufacturing Company, by its attorney, J. N. Nathans, and filed the following bond in error, which bond in error is in the words and tenor following:

112 *Bond.*

Supreme Court of the United States.

THE NASHUA MANUFACTURING COMPANY, a Corporation under the Laws of New Hampshire, Plaintiffs,
against
THE SOUTH CAROLINA RAILWAY COMPANY, a Corporation under the Laws of South Carolina, Defendants.

Know all men by these presents that we, S. Y. Tupper, of the city of Charleston and State of South Carolina, and Ansley D. Cohen, of the city of Charleston and State of South Carolina, and B. Mantone, of the city of Charleston and State of South Carolina, are held and firmly bound unto the South Carolina Railway Company, a corporation created under the laws of South Carolina, in the sum of two hundred and fifty dollars ($250.00), to be paid to the said
113 The South Carolina Railway Company, their successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this twenty-fifth day of June, 1885.

Whereas the above-named The Nashua Manufacturing Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of South Carolina:

Now, therefore, the condition of this obligation is such that if the above-named The Nashua Manufacturing Company shall prosecute

its said writ of error to effect and answer all costs and damages if said The Nashua Manufacturing Company shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

S. Y. TUPPER, JR. [L. S.]
ANSLEY D. COHEN. [L. S.]
B. MANTONE. [L. S.]

Sealed and delivered in presence of—
F. M. WATERS.

114 STATE OF SOUTH CAROLINA, *County of Charleston:*

Ansley D. Cohen, one of the obligors named in the within bond, being duly sworn, says that he is a resident and land holder within this State and is worth the sum of two hundred and fifty dollars over and above all his liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

ANSLEY D. COHEN.

Sworn to before me this 25 day of April, 1885.
J. B. R. FINLEY, [L. S.]
Notary Public.

STATE OF SOUTH CAROLINA, *County of Charleston:*

B. Mantone, one of the obligors named in the within bond, being duly sworn, says that he is a resident and land holder within this State and is worth the sum of two hundred and fifty dollars over and above all his debts and liabilities which he owes or has incurred and exclusive of property exempt by law from levy and sale under an execution.

B. MANTONE.

Sworn to before me this 25th day of April, 1885.
J. B. R. FINLEY, [L. S.]
Notary Public.

115 STATE OF SOUTH CAROLINA, *County of Charleston:*

On the twenty-fifth day of April, 1885, before me personally came S. Y. Tupper, Jr., Ansley D. Cohen, and B. Mantone, and on the — day of ——, 1885, came —— ——, to me known, and known to me to be the individuals described in and who executed the within instrument, and severally acknowledged to me that they executed the same.

J. B. R. FINLEY, [L. S.]
Notary Public.

Approval of bond.

HUGH L. BOND, *C't Judge.*

115½ [Endorsed:] No. roll 891. United States of America, district of South Carolina, fourth circuit. The Nashua Manf. Co. *vs.* The South Carolina Railroad Co. Bond of appellant. Filed 25 April, 1885. J. E. Hagood, C. C. C. U. S., dist. S. C.

116 And on the 29th day of April, A. D. 1885, came into court the plaintiff, The Nashua Manufacturing Company, by its attorney, J. N. Nathans, and filed the following writ of error, which writ of error is in the words and tenor following:

Writ of Error.

117 THE UNITED STATES OF AMERICA:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of South Carolina, greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you, between The Nashua Manufacturing Company, a corporation created under the laws of New Hampshire, plaintiff, and The South Carolina Railway Company, a corporation created under the laws of South Carolina, defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and
118 proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this the 29th day of April, in the year of our Lord one thousand eight hundred and eighty-five (1885).

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

[Endorsed:] United States of America. No. roll 891. The Nashua Manufacturing Company, a corporation created under the laws of New Hampshire, plaintiff in error, against The South Carolina Railway Company, a corporation created under the laws of South Carolina, defendant in error. J. N. Nathans, att'y for plaintiff in error. Writ of error. Original. Filed Ap'l 29, 1885. J. E. Hagood, C. C. C. U. S., dist. S. C.

[Endorsed:] Entered docket civil cases, folio 76. T. J. Tuomey, U. S. marshal. 6th May, '85.

119 I certify that I served Charles H. Simonton personally, one of the attorneys in this cause, with a copy of the within by leaving the same with him on the 11th May, A. D. 1885.

W. D. HANNIFIN,
Deputy U. S. Marshal.

120 In the Circuit Court.

UNITED STATES OF AMERICA,
District of South Carolina, Fourth Circuit:

I, J. E. Hagood, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing is a true and correct copy of the records, proceedings, and of the verdict in the case of The Nashua Manufacturing Company, plaintiff, against The South Carolina Railway Company, defendant, rendered as aforesaid, together with all the proceedings had in the cause relating to the same.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston and district of South Carolina, this the 26th day of September, A. D. 1885.

[Seal U. S. Circuit Court, District of So. Carolina.]

J. E. HAGOOD,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: South Carolina C. C. U. S. No. 353. The Nashua Manufacturing Company, plaintiff in error, *vs.* The South Carolina Railway Company. Filed October 8, 1885.

Office Supreme Court U. S.
FILED
NOV 10 1888

In the Supreme Court of the United States.

No. 87.

WRIT OF ERROR TO THE CIRCUIT COURT.

OF FOURTH CIRCUIT.

DISTRICT OF SOUTH CAROLINA.

THE NASHUA MANUFACTURING COMPANY,
PLAINTIFF IN ERROR.

vs.

THE SOUTH CAROLINA RAILWAY COMPANY,
DEFENDANT IN ERROR.

BRIEF

OF THEODORE G. BARKER, ESQUIRE,
Counsel for defendant in Error.

CHARLESTON, S. C.
WALKER, EVANS & COGSWELL CO., PRINTERS,
Nos. 3 and 5 Broad and 117 East Bay Streets.
1888.

IN THE SUPREME COURT OF THE UNITED STATES.

No. 87.

WRIT OF ERROR TO THE CIRCUIT COURT OF THE FOURTH CIRCUIT—DISTRICT OF SOUTH CAROLINA.

THE NASHUA MANUFACTURING COMPANY,
PLAINTIFF IN ERROR.

vs.

THE SOUTH CAROLINA RAILWAY COMPANY,
DEFENDANT IN ERROR.

1

BRIEF OF ARGUMENT OF THEODORE G. BARKER, ESQUIRE, FOR DEFENDANT IN ERROR.

POINT FIRST.

The Record shows a fatal variance between the declaration and proof sufficient to disentitle plaintiff from recovery, and enough to prevent the Circuit Judge from putting the burthen of proof on defendant by giving plaintiff's first request.

2

This action is brought upon the old Common law liability of a common carrier, either for the alleged negligent performance of duty in the exercise of the quasi public employment of carrier, or for negligence constituting the breach of an implied contract to safely deliver goods received by defendant for transportation.

The complaint, framed purposely to conceal and escape from the special contracts governing the parties, and to try to throw the burthen of proof on defendant merely alleges the receipt of the goods by defendant as carrier, and charges non-delivery through negligence of defendant, but does not

3

discover, by appropriate allegations, whether the action is intended to be "*on the case*" or in "*assumpsit.*"

In whichever of these two distinctive forms of action the Complaint is interpreted to be, the record, as will be seen, discloses a case of fatal variance between the declaration and the proof, which, alone, must debar the plaintiff from recovery, and should, as Defendant in Error contends, de-
4 cide this Court not to reverse the Judgment of the Circuit Court.

Whether the action be interpreted as "case," for negligence in the performance of the employment as a common carrier, or "assumpsit," for breach of a contract, implied from the receipt of the goods, such is not the case made in plaintiff's proof, nor is such the legal relation of the parties, which existed in the transaction from which the cause of action arose.

The proof shows a case, not of a general *locatio operis mer-*
5 *cium vehendarum*, wherein the duties and liabilities of the carrier are "by the custom of the realm," nor a case of contract duty, implied from the receipt of goods by a common carrier,—one or other of which, it may be said, is the case made in the declaration—but shows a case of several special contracts, by through bills of lading, each signed by the carriers who received the cotton, and through them inuring to the connecting carriers respectively, and each containing express terms and special stipulations and conditions, which, exclusively, determine the legal contract re-
6 lations, and regulate the mutual contract liabilities of the parties to the contract, in each separate case.

According to Plaintiff's proof, the action should have been brought upon these special contracts, and the Complaint should have set up the contracts, as they were made, and should have alleged the loss of the particular cotton carried under each bill of lading separately, and the burthen of proof corresponding to such allegations properly rested on plaintiff.

The claim as made in the Complaint is, that certain Bales
7 of cotton, in sundry lots, were shipped, at various points, in Alabama and Georgia, and received by several different

Rail Road Companies to be transported from the point of shipment over the receiving road, in each case, and its connecting lines of transportation, to the town of Nashua, New Hampshire, which bales of cotton, amounting in the aggregate to five hundred and twenty-two bales, were in course of said transportation delivered to and received by defendant, as a common carrier and one of aforesaid connecting lines of transportation, in the City of Augusta, Georgia, to 8
be by the said Defendant, for its proportion of the freight money agreed upon, safely carried to Charleston, South Carolina, and there delivered to the next connecting carrier in course of transportation to their place of destination as aforesaid. That said defendant did not safely carry and deliver as aforesaid the said five hundred and twenty-two bales of cotton, but on the contrary, whilst the said cotton, so received for transportation by the said defendant, as alleged in Paragraph III herein, was in the possession and custody and under the control of the defendant as a common car- 9
rier, two hundred and seventy-four bales thereof were, by the carelessness and negligence of the defendant, its officers, agents, and servants, destroyed by fire to the damage of the plaintiff, &c."

The proof [produced by plaintiff] does not establish the case of a general or implied contract, and liability, of a common carrier at common law, but shows, that the cotton, which came into the hands of the Defendant, was received by it under fifteen separate bills of lading, in each of which the terms, stipulations and conditions were set forth, upon 10
which the cotton therein named was to be transported by the carrier who received it from the owner, and by the successive connecting carriers who transported it. (*Transcript*, fol's 32, 33, 37, 42 to 60 inclusive, 62 to 67 inclusive.)

Of these fifteen separate bills of lading, constituting separate contracts, five were issued by Rail Road Companies in the State of Alabama and ten by a Rail Road Company in the State of Georgia. (*Transcript*, fol's 3 to 9 inclusive, and 42 to 60 inclusive.)

Of the five issued by Rail Road Companies in the State 11
of Alabama, three were issued by the Western Railroad

Company, of Alabama, respectively, one for twenty-five bales, another for twenty-five bales, and one for forty bales of cotton, and two by the East Alabama Railway Company, respectively for one hundred and sixty-nine bales and for fifty-five bales of Cotton. (*Transcript*, fol's 42 to 60.)

The ten bills of lading issued by Rail Roads in Georgia were all issued by the Atlanta and West Point Rail Road
12 Company, and were special contracts, respectively for 3, for 12, for 12, for 3, for 28, for 8, for 27, for 38, for 56 and for 21 bales of cotton. Of these bills of lading three were issued to and accepted by Agents of Plaintiff at Hogansville, two at Newman, two at Grantville, and three at West Point, in the State of Georgia. (*Trauscript*, fol. 42to 60.)

The form of the bills of lading for cotton so issued, received and agreed to be transported by the Rail Road Companies in the State of Alabama differed materially from the bills of lading for cotton issued by the Rail Road Compa-
13 nies in the State, of Georgia and the stipulations and conditions of the special contract, in one set of bills of lading, varied from those expressed in the other.

These stipulations and conditions in each case followed the cotton from the receiving Rail Road Company, which made the contract for itself and its connecting lines, into the hands of the connecting Roads, and determined, in each case, the distinct liability of the defendant, as one of such connecting lines of transportation.

None of these separate contracts or bills of lading are
14 mentioned in the complaint. While, under the Code, these fifteen separate and distinct special contracts in writing, in an action *ex contractu*, might have been declared on in one complaint, yet each bill of lading constituted a separate contract, and should have been stated in the Complaint, each "as a separate cause of action."

"All the Codes require that the different causes of action should be separately stated. In other words, each must be set forth in a separate and distinct division of the Complaint or petition, in such a manner that each of these divisions
15 might if taken alone be the substance of an independent action. * * * That such a separation should be made,

and that each distinct cause of action should be stated in a single and independent division, so that the defendant may answer or demur to it without any confusion with others is plainly indispensable to an orderly system of pleading, and is expressly required by all the Codes." *Pomeroy's Remedies and Remedial Rights*, Sec. 442, Code of Procedure of South Carolina Sec. 188, adopted in U. S. Circuit Court for District of South Carolina. Rules of Court. 16

It was not, under the new or the old system of pleading, possible for Plaintiff, legally, to combine fifteen separate shipments, represented by fifteen distinct bills of lading, constituting fifteen separate contracts, entered into by three separate Rail Road Companies, made in two States, for the performance of contracts of transportation over various connecting lines, (some of these contracts varying in their terms and conditions from the others,) and by aggregating the whole number of bales of Cotton, in the whole fifteen contracts, to make up one cause of action, and to declare 17 upon it, as the contract of Defendant, "one of the connecting lines to transport 522 bales of cotton." Nor was it possible for Plaintiff, by so doing, to shift the burden of proof upon the Defendant.

When the proof disclosed the fact of these fifteen separate contracts in writing it disclosed a variance, which must debar recovery by the Plaintiff, and which precluded the Circuit Judge from granting the instructions prayed for by Plaintiff.

18

"In actions upon contract the declaration must in all cases state the contract upon which the action is founded and the breach of it. Contracts must be stated in the declaration as they were really made, either in terms or according to their legal effect, and if there be a variance it will be fatal." *1 Tidd's Pr. 434.*

"The principles of the Common law are to be understood with the limitation, that there is no special contract, which varies the obligation of carriers, for if there clearly appears to be such contract, it governs the case." *Angel on Carriers, Sec. 324, 220.*

"The old mode of declaring used to be on the custom of the realm but this is an *assumpsit*, it is founded in contract, and the contract must therefore govern the parties." *Per Lord Kenyon, Anon vs. Jackson*, cited 19 in *Angel on Carriers Sec. 220.*

In South Carolina, the State, where this action was brought, in which the Defendant Carrier's entire line of road and its yards, where the cotton in question was burned, were located, where the alleged contract was to be performed, and where Defendant's principal office was, it has always been held, that the bill of lading given by a Rail Road Company to a shipper constitutes the contract
20 between the parties—and in a recent case it was held, that "The bill of lading is the contract between the shipper and the company, by which the company agrees to transport and deliver beyond its own lines, and the terms and conditions of the contract regulate and determine the duties and obligations of the contracting parties." *Piedmont Mfg. Co. vs. Columbia & Greenville Rail Road Co. 19 S. C. 353.*

In New York it is held, that "On contract for through transportation, exemptions inure to connecting carriers although not so expressly provided. "*Manhattan Oil Co. vs.*
21 *Camden & Amboy R. R. and Trans. Co. 54 N. Y. 197.*"

The Supreme Court of the United States (in 93 U. S.) say, "We find no error in what the Circuit Judge said upon the question whether the bills of lading with the exceptions constituted the contract between the parties. The charge in this particular is justified by very numerous authoritative decisions" (citing numerous cases.) *Bank of Kentucky vs. Adams Express Company, 93 U. S. 172.*

The Complaint of Plaintiff, by lumping the several parcels of goods alleged to have been delivered to and received
22 by defendant, as a common carrier, without distinguishing the separate contracts by and under the terms of which the several parcels came into the hands of defendant, inextricably confused the subject-matter of several causes of action and prevented the Court and Jury from assigning each parcel of cotton to the particular bill of lading or contract to which it belonged.

There were three forms of special contracts, under one of which (as it appeared in testimony) two hundred and eight (208) bales of cotton in the aggregate were shipped, from
23 various points in Georgia, upon ten (10) separate bills of lading, and, under the other two of which forms, three hun-

dred and fourteen (314) bales of cotton, in the aggregate, were shipped from various points in Alabama upon five (5) separate bills of lading.

The ten bills of lading, under which the two hundred and eight (208) bales were received by the Atlanta and West Point Rail Road Company in Georgia, were known as the "long bills of lading" and contained an express contract stipulation, that 24

"Neither the Atlanta and West Point Rail Road Company, the Companies constituting the through line, nor any one of them, will be responsible for loss or damage, delay or detention arising from * * * fire, or any other cause whatever, unless the same be proved to have occurred from the fraud or gross negligence of the Company or Companies their agents or servants, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots, at stations on wharves, or at sea, or in port, or on cars, boat, vessel or steamer. * *"

These bills of lading also contained the following stipulation: 25

"* * And it is further stipulated and agreed that in case of any loss or damage done to or sustained by any cotton herein receipted for during transportation whereby any legal liability may be incurred, by the terms of this contract, that the Company alone shall be held responsible therefor in whose actual custody the cotton may be at the time of the happening of such loss or damage, and the Company incurring such liability shall have the benefit of any insurance which may have been effected upon or on account of said cotton * * *."

The five bills of lading, under which the three hundred and fourteen (314) bales of cotton were received, viz: three by the Western Rail Road of Alabama and two by the 26 East Alabama Railway Company, were known as the "short bills of lading" and did not exactly correspond with each other in their particular provisions, but they were alike in not containing the clause exempting from fire nor the stipulation entitling the carrier incurring liability to the benefit of insurance which may have been effected, as did those of the Atlanta and West Point Rail Road Company, above set forth.

It will be at once perceived, how essential it was, that the Plaintiff should have set forth the special contracts in its 27 Complaint, and have alleged what cotton it claimed that

defendant was liable for under the one form of bill of lading, and what cotton defendant was liable for under the other form of contract. As we shall show hereafter from the Record, Plaintiff, in its correspondence before suit, attempted to take the position, that all of the 108 bales, (really the subject of this suit) were under "short bills of lading," but plaintiff in its complaint did not, as it was bound to do, allege the
28 contracts under which the cotton sued for was transported, and so failed to present the issue it had made with defendant.

Having failed to set up the special contracts and the alleged breaches of them, and having undertaken to lump all the fifteen shipments into one alleged implied contract, it could not properly call upon the Court to charge the jury that the burden of proof was upon defendant.

POINT SECOND.

29 *As to the two hundred and eight (208) bales of cotton, shipped by plaintiff on the Atlanta and West Point Railroad the defendant, if liable as claimed, was entitled to have the benefit of the insurance which was effected by plaintiff upon said cotton, and, in order to bring its action, plaintiff should have alleged that it had given to the defendant the benefit of that insurance, or that it had performed its part of the contract by tendering such benefit to the defendant, and that the same was refused.*

It was not denied, that plaintiff had previously effected
30 insurance on all the cotton owned by it, which was destroyed by fire in defendant's yard on the 29th of October, 1883, including the two hundred and eight bales of cotton shipped by it on the Atlanta and West Point Railroad Company, under bills of lading (long form) containing the clause by which the carrier, incurring liability for cotton so destroyed by fire, was entitled to have the benefit of any insurance which the owner may have effected upon, or on account of, said cotton.

The bill of lading contains "a promise for a promise."
31 The contract and the facts proved make a case of mutual promises wherein the plaintiff's promise is executed, but the

thing it had agreed to perform is executory. "If," says Mr. Tidd, "the consideration be executory, the plaintiff cannot bring his action till the consideration be performed." *1 Tidds Pr. 433.*

Here the plaintiff had promised, that, "in case of any loss or damage done to, or sustained by any cotton herein receipted for during the transportation, whereby any legal liability may be incurred by the terms of the contract, the 32
Company incurring such liability shall have the benefit of any insurance" which may have been effected by plaintiff.

By the terms of the contract, the defendant Company incurred such "legal liability" the moment when the loss occurred to the cotton. According to plaintiff's promise, defendant became, *eo instanti*, entitled to have from plaintiff the benefit of the insurance which had been effected upon or on account of said cotton. The plaintiff was under an executed promise to give to defendant the benefit of such insurance, and the thing to be done—the giving the ben- 33
efit — was executory; and, according to the established principle of law, above stated, the plaintiff cannot bring his action till the consideration be performed, and must aver in his declaration that he has performed it, or has offered to perform it, but that defendant has refused to accept, or, at the least, that he, plaintiff, is ready and willing to perform his part of the contract.

"Covenants or agreements are of three kinds. * * * * * * * * * *Thirdly*, There is also a sort of covenant which are mutual conditions to be performed at the same time, and, in these, if one party was 34
ready, and offered to perform his part, and the other neglected or refused to perform his, he, who was ready and offered, has fulfilled his engagement, and may maintain his action for the default of the other, though it is not certain that either is obliged to do the first act. And where there are mutual promises, yet, if one be the consideration of the other, then a performance is, in general, necessary." (*1 Tidd Pr. 437.*)

"When the conditions are mutual, and to be performed at the same time, the plaintiff must aver that he was ready and offered to perform his part." *Ib. 438.*

"The dependence or independence of covenants is to be collected from the evident sense and meaning of the parties." *Per Lord Mans-* 35
field, in *Kingston* vs. *Preston*, cited in *Jones* vs. *Barclay, Douglass 490.*

"When two acts are to be done at the same time, * * * neither can maintain an action without showing performance or an offer to perform his part, though it is not certain which of them is obliged to do the first act." *Pordage* vs. *Cole*, 1 *Wms. Saunders. Note by Sergeant Williams.*

The contract, here, is "what the French law calls a commutative contract, involving mutual and reciprocal obliga-
36 tions, where the acts to be done on one side form the consideration for those to be done on the other, and it would seem to follow," says Judge Story, "upon principles of natural justice, that if they are to be done at the same time, neither party could claim a fulfillment thereof, unless he had first performed, or was ready to perform, all the acts required to be done on his own part."

Hyde and Gleises vs. *Booreams & Co., 16 Peters 169.*

The complaint set forth no such performance of the contracts by plaintiff as the law requires, and judgment below
37 was properly directed for defendant.

POINT THIRD.

It was incumbent on plaintiff, not only to aver in his complaint that he had given the benefit of the insurance which he had effected upon the two hundred and eight (208) bales of cotton received by defendant, under the bills of lading of the Atlanta and West Point Railroad Company, which entitled defendant to any insurance plaintiff may have effected, but to prove that, in this regard, he had performed his part of the
38 *contract with defendant.*

The effort was made in the testimony to prove that plaintiff had done something in the direction of giving defendant the benefit of some insurance, and the effort is so far an admission, that defendant was entitled to have insurance on the 108 bales of cotton for which this action is brought, but nothing there appears which can be considered as evidence showing that plaintiff had complied with the terms of the contract it had made.

It was admitted by the Treasurer of the Nashua Manu-
39 facturing Company, Frederick Amory, that plaintiff had an open policy in the American Insurance Company for

$600,000 or more. That the Insurance Company had no defence on that policy, to his knowledge—that the Company was solvent (*Transcript, fol. 38*); that plaintiff had collected from said Insurance Company the full insurance of $60.00 per bale, and interest, upon 166 of the 274 bales of cotton burned, and that it had also collected from the defendant in this suit (the South Carolina Railway Company) the full value at $51.34 per bale of those same 166 40
bales of cotton, and had credited its insurer with the amount collected from the defendant. (*Transcript, fol. 31.*)

It was stated by the Treasurer that the Nashua Manufacturing Company had brought suit for the balance (108) of the 274 bales of cotton burned, against the American Insurance Company. It also appears that a letter was written by Robert H. Gardiner, Jr., attorney for plaintiff here, to John B. Peck, General Manager of defendant (South Carolina Railway Company), July 22nd, 1884 (*Transcript, fol. 88*), in which an offer is made, *upon certain conditions* which 41
plaintiff could not lawfully exact, to turn over to the South Carolina Railway Company, *and the Norfolk and Western Railroad Company*, certain suits pending, brought by the Nashua Company *and the Jackson Company* against the American Insurance Company *and the Boylston Insurance Company*, and that said offer, *in consequence of the conditions* had been declined.

We will recur to this matter further on.

POINT FOURTH.

42

The Circuit Judge rightly refused plaintiffs' first instruction as prayed, viz: "That the burden of proof is upon defendant to show that the cotton of the plaintiffs destroyed by fire was cotton included in bills of lading, giving the carrier exemption therefor, unless negligent; giving also the benefit of insurance, and in the absence of such proof, plaintiffs are entitled to recover."

Of 522 bales of cotton belonging to plaintiff, which had been received by railroads which connected with defendant's road, 274 bales had been burned in the yards of the South 43
Carolina Railway. The defendant paid plaintiff for 166 of

these bales, upon the statement of plaintiff's attorney that 166 of the 274 must have come to defendant's yard from points in Alabama, under short bills of lading, but plaintiff refused to admit that the balance of the 274, viz: 108 bales or some of them must be assumed to have come from points in Georgia, under bills of lading issued by the Atlanta and West Point Railroad Company, containing the exemption
44 and the benefit of insurance clause, while the defendant claimed the insurance on the 108 bales.

The question was, whether the 108 bales had come to defendant's yards under the Alabama, or short bills of lading, which did not contain the exemption and benefit of insurance clause, or whether they or any of them had come from points in Georgia on the Atlanta and West Point Railroad under the long bills of lading which did contain that clause.

Plaintiff, by its attorney, Robert H. Gardiner, Jr., in his
45 correspondence, attempted to take the position, that defendant was liable to pay for all of the 108 bales, as cotton coming to it from Alabama under short bills of lading; in effect asserting that out of the 522 bales, which were in defendant's yards and exposed to the fire, and of which 314 bales had come from Alabama, under short bills of lading, without exemption and benefit of insurance clause, and of which 208 bales had come from Georgia under long bills of lading, with the exemption and insurance clause, the fire, which consumed 274 of the 552, had
46 been so discriminating in its course, as to pick out *only* bales of cotton brought from Alabama under short bills of lading, without the exemption and insurance clause, and had left untouched *all* the 208 bales of cotton which had come from Georgia, under the long bills of lading with the exemption and insurance clause, and that of the 274 bales which had been burned, not only the 166 bales which defendant had paid for had come under the Alabama short bills, but that the remaining 108, not paid for, had also come under the short bills, that none of
47 the cotton burned had come under the long bills of lading, and, so, none of the 274 bales burned were entitled to the exemption and benefit of insurance.

There was no evidence that the Georgia cotton lay together in one place in the yard, and the Alabama cotton lay together in another place in the yard. There was evidence, that, out of the 522 bales that had come to defendant's yards, 248 had escaped the fire, gone forward and arrived at plaintiff's mills. The statement of Gardiner, attorney for plaintiff, made to John B. Peck, general manager of the South Carolina Railway, April 21st, 1884 (*at folio* 48
83 of the Transcript), admits, that, of these 248 received at the plaintiff's mills, 100 (100-248) had been shipped via the Atlanta and West Point Railroad (and therefore had come from points in Georgia under the long bills of lading containing exemption and benefit of insurance clause), while 148 bales (148-248) had come from the East and West Alabama Railroads (and therefore had come from points in Alabama, under the short bills, without the exemption and benefit of insurance clause).

So that we have the cotton, so shipped, in the following 49
ratio:

Total number of bales shipped..... 522
Number of bales shipped from Georgia under long bills of lading of the Atlanta and West Point Railroad, with insurance clause 208 bales, equal to..... $\frac{208}{522}$ of the whole
Number of bales shipped from Alabama under short bills of lading without insurance clause, 314 bales, 50
equal to..... $\frac{314}{522}$ of the whole

And we have the cotton, which reached plaintiff, in the following ratio:

Total number arrived at plaintiff's mills.... 248 bales
Of which there were from Georgia, under long bills of the Atlanta and West Point Railroad, with insurance clause 100, equal to..... $\frac{100}{248}$ of the whole
And there were from Alabama, under the short bills of the Alabama Railroads, without insurance clause, 148, 51
equal to..... $\frac{148}{248}$ of the whole

It is striking, how the relative proportion of long bills of lading cotton to short bills of lading cotton, represented in the shipment, is approximately preserved in the proportion in which those, which escaped the fire, arrived at plaintiff's mills.

The ratio of shipment being, long bills $\frac{208}{322}$, short bills $\frac{314}{322}$. And the ratio of arrival being, long bills $\frac{100}{248}$, short
52 bills $\frac{148}{248}$.

The reasonable presumption would be, that the cotton had been burned in about the same ratio, and that the fair statement would have been about $\frac{3}{8}$ for the long bills, and $\frac{5}{8}$ for the short bills of lading, cotton.

Say total number burned.....		274 bales
Allowed for long bills, say.....	103	
Allowed for short bills, say.....	171	
		274 bales.

These figures were very nearly those adopted by Mr.
53 Gardiner in his statement to the South Carolina Railway Company, April 21st, 1884, (*Transcript fol. 83*), in which he, by an ingenious process of calculation, reached "166 bales, as the lowest number which were to be assumed to have been brought under the short bills of lading," (without benefit of insurance). He would have been wholly correct if he had said "the highest number."

His statement shows, that he was impressed with the conviction, that the balance of the 274 bales burned, after deducting the 166 bales (short bills), viz: 108 bales, belonged
54 to the long bills, and were entitled to benefit of insurance. Indeed, his statement so places the 108 bales, *at fol. 83*, thus: "Shipped via East and West Alabama Railroad and burned at Charleston, 166 bales. Shipped via Atlanta and West Point Railroad and burned at Charleston, 108 bales," and at *fol. 84* he says, in so many words, speaking of the 108 bales which were not settled for, "The bills of lading on which your R. R. declines to pay, were all issued in the State of Georgia by the Atlanta and West Point R. R. &c." And this was also the division of the 274 bales burned,
55 which he actually adopted in his *settlement* between the Nashua Manufacturing Company and the American Insur-

ance Company, as above stated. He settled for the 166 bales, *as cotton covered by short bills of lading*, and the insurance company resisted payment of the balance (108 bales), on the assumption, arrived at between them, that 108 of the bales burned had been shipped on the Atlanta and West Point Georgia long bills of lading, containing the insurance clause, the Company making its defence *because* of that clause being in the bills of lading for the 108 bales 56
fol. 88, and, yet the attorney for plaintiff, Gardiner, persisted in maintaining, that none of the 108 bales of cotton burned had come to defendant under long bills of lading.

The order, in which the several lots of cotton came into defendant's yards, was necessarily governed by the order of shipment of the several lots or parcels, in divers car loads, varied of course by the delays of transportation over the several railroads between points of shipment and the road of defendant, and by the order of arrival at its receiving point Augusta, Ga. The admixture and confusion of the various 57
lots came about, therefore, from the acts of plaintiff's own agents, in loading and sending off the several lots or car loads from the several points, and on the separate railroads, in the States of Georgia and Alabama, and not from any act or omission of defendant, causing a negligent or improper "confusion of goods," in violation of any duty assumed by it or imposed by law of keeping the various small lots of plaintiff's cotton separate from each other, which would throw upon defendant the burden of proving what part of the 274 bales burned had been shipped on 58
the Georgia roads, and what part on the Alabama roads.

Defendant was rightly entitled therefore to claim, as the most probable assumption, in absence of proof to the contrary, as well as by the admissions of the Attorney of plaintiff, that all of the 108 bales out of the 274 burned, were bales of cotton which had been shipped from points in Georgia under long bills of lading issued by the Atlanta and West Point Railroad Company, and that they contained the stipulation by which the carrier was entitled to the benefit of insurance effected by plaintiff.

59

If the plaintiff's pleadings had been properly framed so

as to present the issue thus made by Mr. Gardiner, (which we contend they were not), then the burden would have been on the plaintiff to maintain its assertion, that the 108 bales of cotton, balance of 274 burned, had, as well as the 166, been shipped under the short bills of lading, and, in maintaining this issue on its part, it would have been necessary for it, in proof, to overcome the natural and rea-
60 sonable presumption, which would assign 108 bales to the long bills of lading, and to maintain (a most improbable assertion and one in the teeth of its own admissions), that all of the 274 bales burned belonged to one set of bills of lading, viz: that without the insurance clause.

But as we have said above, the pleading of plaintiff had wholly failed to allege the facts necessary to present the issue, to which the first instruction prayed for by plaintiff is applicable.

The complaint had not set forth the separate contracts
61 under which the 522 bales of cotton which reached defendant's yard had been shipped, it had not alleged that 208 bales had been shipped under bills of lading containing the benefit of insurance clause, and 314, under bills of lading which did not contain that clause. It had not alleged that of the 274 bales, 166 had been paid for as coming to defendant under short bills of lading, and it has not set forth the facts necessary to enable defendant to discriminate in its answer and in its proof between the cotton shipped under one set of contracts, from that shipped under another and
62 different set of contracts.

In the complaint, then, no issue had been tendered, which could throw the burthen, on defendant, of proving that the 108 bales of cotton were shipped under the form of bill of lading containing the insurance clause. Nor, in the proof offered, did the plaintiff establish any position, which could throw the burden of proof on defendant. In view, neither of the complaint nor the proof, would the Circuit Judge have been justified in giving as his charge to the Jury the first instruction asked for by plaintiff. It cannot be pretended
63 that defendant had in its possession the proof enabling it to show under what particular bills of lading the burned cotton

had been shipped. From the nature of the business of railroad and steamship through lines it could not have such proof, and there is no evidence whatever that it did have such proof in its possession. If on the other hand by reason of the admixture of the various lots of cotton, shipped by plaintiff at various points and dates and arriving in defendant's yards in inevitable admixture and confusion, the plaintiff is deprived of the means of identifying the 64
cotton burned and of proving its assertion that all of the 108 bales were shipped on short bills of lading, it is the plaintiff's own fault and misfortune, which he cannot unload on defendant.

In order to decide upon the propriety of the refusal of the Judge to charge as requested in the first exception, we must have regard to the cause as it presented itself to him at that time. The question is not as to the truth of an abstract proposition of law, nor as to a general rule applicable to most cases, but as to the rule to be applied to this par- 65
ticular case, as it then and there presented itself to the Court.

Plaintiff had declared against the defendant as common carrier, at common law for the destruction of 274 bales of cotton by fire, through the carelessness and negligence of defendant.

Defendant not admitting its liability on a contract to be implied from the mere receipt of the goods by it as common carrier, showed in its answer, that it had as "one of the connecting lines" received the cotton under several 66
separate "contracts specified and set forth in bills of lading given therefor at the date of the receipt and shipment."

Plaintiff did not reply in its pleading to the new matter so set up in defendant's answer. By not replying, it practically joined issue on the allegation that the cotton had been shipped by plaintiff and received by defendant on these several special contracts or bills of lading.

The provision of the Code of Procedure of South Carolina, approved March 1, 1870 and adopted as a rule of practice by the United States Circuit Court for the District of 67
South Carolina, April 24, 1874, is as follows:

"SECTION 191. Every material allegation of the complaint not controverted by the answer as prescribed in Section 172, and every material allegation of new matter in the answer, constituting a counter claim, not controverted by the reply as prescribed in Section 176, shall for the purposes of the action, be taken as true. But the allegation of new matter in the answer not relating to a counter claim, or of new matter in the reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case may require."

68 "Rules of Practice in the Circuit Court of the United States for the District of South Carolina.

RULE I.

The practice, proceedings and forms of process in force on the first day of June, 1872, in the Circuit Courts of this State, shall be of force in this Court as to all matter to which they are applicable.

RULE X.

The forms of pleadings in all civil actions, except in Equity or Admiralty and the rules by which the sufficiency of the pleadings is to be
69 determined, are those prescribed by the Code of Procedure of this State as it existed on the first day of June, 1872."

According to the rule thus laid down, when plaintiff did not reply, the issue was joined on the averment of defendant's answer, that "all of the said cotton was carried under certain contracts, specified and set forth in bills of lading, given therefor at the date of receipt and shipment, which bills of lading were held for or by the plaintiff," (fol. 13, Transcript).

Plaintiff did not deny the special contracts. On the con-
70 trary it offered them in evidence and relied on them. Here as we have seen was a fatal variance. The *allegata* were on a common law liability. The *probata* a special liability under a special contract, express and in writing. On pleadings the parties were not at issue. Instead of amending his complaint so as to make its allegations conform to his case, the plaintiff preferred to go to trial upon its imperfect pleading, admitting or treating as fact, the special contracts set up by defendant. As the liberality of code pleading permits that the pleadings may be conformed to the proof,
71 we must treat this case as if the plaintiff admitting the plea of defendant, had set up the special contracts as its causes

of action in its complaint, and upon them claimed a verdict. That is to say, as if its setting out the 15 shipments in its 2nd paragraph, had stated after each one, the terms of the special contract under which it was shipped, and had alleged that the cotton mentioned in each had been burned in defendant's yard by negligence. And we must treat the case of the defendant as not denying its liability on five of these (the Alabama cases, which had been paid for before 72
suit brought) and challenging the plaintiff to make good its case on the other ten (the Georgia cases). In no other way can this case retain its standing in Court. It can only maintain itself by issues, formulated from the evidence, accepted and tried by the parties. The affirmative necessarily being on the plaintiff.

When therefore the plaintiff under the statement of the issues which we have shown above, proceeded to make his case, he was obliged to prove 1st. The shipment. 2nd. The place of shipment. 3d. The contract under which the ship- 73
ment was made. 4th. That the liability was incurred under the contract, to wit: the destruction by fire of the cotton named in the bill of lading. 5th. His performance of his contract (payment of freight, and that he had given to defendant the benefit of any insurance effected by him on cotton burned, or the reason why he did not. The tender of such benefit of insurance having been made without condition or qualification to the defendant incurring the liability.

When all these are proved, and not until then is the 74
burden of excusing itself put on the carrier.

When plaintiff put the bills of lading in evidence (*Trans., fol. 40 to 60 inclusive*) and proved their acceptance by agents of plaintiff, it concluded, by its own proof, the only issue presented by the pleadings, viz: whether the cotton was carried generally, or on those special contracts, and defendant then and there became entitled to a judgment, practically confessed.

Plaintiff, however, in testimony, endeavored to avoid the effect of the palpable *variance* between its case, as made in 75
its pleading and that made in proof, by undertaking to

prove that defendant was not entitled to the exemption and benefit of insurance clauses, in defence of its liability incurred for the loss of the 108 bales, remaining unpaid for, out of the 274 bales which had been burned.

By introducing the bills of lading in order to prove its case plaintiff had entirely shifted the attitude it had assumed in pleading and took a totally new position. It
76 set up as its case the fifteen bills of lading, ten of which secured to defendant the benefit of insurance on any cotton which might be destroyed by fire. The burden of proof then was upon plaintiff to show that the cotton it was suing for all came to defendant on the short bills of lading, which did not entitle defendant to the benefit of insurance, and to show either that defendant was not entitled to insurance, or that plaintiff had given to defendant the insurance to which it was entitled, or had offered to do so.

Plaintiff assumed the burden of proof of the position,
77 which its attorney, Robert H. Gardiner, Jr., had attempted to take in his correspondence with John B. Peck, General Manager of the South Carolina Railway Company, viz: that all of the 108 bales unpaid for were bales of cotton named in the Alabama short bills of lading. True it failed to maintain that position—and by its own proof and admissions showed that the 108 bales must have been covered by long bills of lading containing the insurance clause. By its proof and its attorney's admissions it was effectually estopped from denying that the 108 bales of cotton were
78 under long bills of lading, containing the insurance clause. It relieved defendant altogether from the necessity and of course from the burden of proving that fact, and could not properly ask the Court to charge the jury that the burden of proof of that fact was on defendant.

To put it in another way:

Plaintiff sues in one Count for 274 bales of cotton destroyed by fire whilst in custody of defendant. To prove his case he produces 15 special contracts, ten of which requ.re him as a part of his case to give or to offer to give
79 defendant the benefit of the insurance he has effected on the cotton. This is his own testimony. Before he can re-

cover he must prove his whole case. He proves that by settlement between the parties, 166 bales are covered by contracts not including this condition. The same settlement and the rest of the plaintiff's own proof, raises the inevitable presumption that the remainder or a part of the remainder must be covered by the condition of the long bills, else he would not have offered the contracts in evidence. This being so, he must overcome this presumption, 80
that is to say, the burden of proof is on him to prove, that the 108 bales were all under the Alabama short bills of lading, and that, as to none of them, was defendant entitled to the exemption and benefit of insurance. Clearly, the Circuit Judge was right in refusing to say that the burden of this proof was on the defendant.

POINT FIFTH.

The Circuit Judge was not in error in refusing to give the second instruction to the jury as requested by plaintiff, viz: 81
"That the assent of the shipper to the contract contained in a bill of lading is necessary, and that its mere delivery to the shipper is not evidence of such assent."

The instruction, as framed, implies and by plain implication would have committed the Judge, had he adopted it as his charge, to giving the jury to understand that the case presented to them was a case of mere delivery of the bill of lading to the shipper, without assent on his part to it or acceptance of it, as the contract between him and the carrier. This would not have been justifiable, in view of the 82
total absence of all proof, that the shipper in this case had not assented to the contract contained in the bill of lading, and in view of complete proof that the bills of lading were delivered in each case to an agent of the plaintiff authorized to accept bills of lading for his principal—and that these bills of lading so accepted were adopted and acted on by plaintiff as the contracts between him and the defendant carrier.

All instructions asked for are to be taken not as expositions of abstract law, with which the Court favors the jury, 83
but as concrete propositions having relation to and bearing

directly upon the case made on pleadings and proof. The evidence before the Court was uncontradicted, as above stated, that these bills of lading were so received and acted upon by plaintiff. It followed, as consequence of law, that the delivery to the shipper in this case was evidence of his assent.

"The acceptance of the carrier's receipt creates a contract according
84 to its terms between him and the shippers."
Hutchinson on Carriers, Sec. 240.

"Accordingly when the owner of goods accepts a receipt he is conclusively presumed, in the absence of fraud or imposition, to have assented to all the terms and conditions contained in it, which amounts to a contract with the carrier, and whether called a special, or express contract, or a special acceptance, becomes at once binding on both parties." *Ibid, Sec. 241.*

In the "*Bank of Kentucky vs. Adams Express Company, 93 U. S., 172*, this Court sustained a charge to the jury,
85 which expressed the law, as follows:

"If the jury believe that the Teller of the Louisana Bank presented the bill of lading to the agent of the Express Company for his signature with the blanks filled and at such time delivered to the agent the package of money, without disclosing who was the owner of it, but addressed to the plaintiff at Louisville; that the bill of lading was signed and re-delivered to the teller and forwarded to the plaintiff at Louisville, then the bill of lading, thus signed, constitutes the contract, and all the exceptions in it are part of the contract, no matter whether each or all of them were known to the Louisiana Bank or not; and the plaintiff is bound by the contract, whether it expressly authorized the Louisiana Bank to make it or not. The evidence, tending to show that
86 bill of lading was not read at the time of signing it, and that nothing was said about the exceptions contained in it, is immaterial."

POINT SIXTH.

The same principles of law and the authorities just quoted dispose of the third exception based on the refusal of the Circuit Judge to charge in the language of the following request, viz: "That the law of Georgia where the bills of lading in this case were issued, impose the common law liability upon carriers unless a special contract is proved, and
87 *that mere delivery of the bills of lading to the shipper or his agent is not evidence of such contract, and that if the jury*

find that the plaintiff, or their duly authorized agent, did not expressly assent to the terms of the contract contained in the bills of lading issued to plaintiffs by the Atlanta and West Point Railroad Company, they cannot claim the benefit of plaintiff's insurance, if any, or exemption on account of fire."

This prayer for instruction contains the admission, that the bills of lading for the one hundred and eight bales of 88
cotton claimed in this suit were issued in the State of Georgia, and by the Atlanta and West Point Railroad Company, and contained the stipulation giving the carrier the benefit of shipper's insurance and exempting it from loss by fire, for which defendant has all along contended, and which plaintiff has denied. The instruction therefore contradicts the position taken by the plaintiff before the Court, and was properly refused on that ground alone.

The law of Georgia however did not govern the liability of the South Carolina Railway Company to the Nashua Man- 89
ufacturing Company of Nashua, New Hampshire, on the contract in this case, which, as far as defendants duty and undertaking went, was to be performed wholly in the State of South Carolina, and is not the law of the defendant carrier's principal office, nor the law of the forum, in which the action is brought.

If the law of Georgia were the law of this case, the rule referred to would not apply, because in this case, a special contract, or to speak more accurately, several special contracts were proven, to have been accepted by plaintiff's 90
agents and acted on by plaintiff, and set up by it in its testimony, which, being proven, govern the case.

POINT SEVENTH.

The Circuit Judge correctly refused to instruct the jury in the language of the plaintiff's fourth prayer, to wit: " that if the bills of lading issued to the plaintiffs or their agent by the Atlanta and West Point Railroad Compauy were so delivered as to constitute the contract between the plaintiffs and* 91
the Company for the transportation of the cotton, then the

stipulation in the same giving the carrier the benefit of the shipper's insurance is unreasonable, contrary to public policy and the legal duties and obligations of carriers and therefore void."

These points of objection were fully discussed and effectually disposed of in the case of the "*Phœnix Insurance Company vs. Erie Transportation Company, 117 U. S.,*
92 312, where this Court held that:

"No rule of law or public policy is violated by allowing a common carrier like any other person having either the general property or a peculiar interest in goods to have them insured against the usual perils though occasioned by the negligence of his own servants. By obtaining insurance he does not diminish his own responsibility to the owners of the goods, but rather increases his means of meeting that responsibility. As the carrier might lawfully obtain insurance against the loss of the goods by the usual perils though occasioned by his own negligence, he may lawfully stipulate with the owner to be allowed the
93 benefit of insurance voluntariiy obtained by the latter. This stipulation does not in terms or effect prevent the owner from being re-imbursed the full value of the goods; but, being valid as between the owner and the carrier, it does prevent either the owner himself or the insurer, who can only sue in his right, from maintaining an action against the carrier upon any terms, inconsistent with this stipulation.

POINT EIGHTH.

The Circuit Judge correctly refused the fifth prayer for instruction as follows, viz: "That to give the carrier the benefit of insurance it must be liable to the shipper for loss; liability
94 *must exist as a pre-requisite to a claim to the insurance, and while carrier denies his liability he cannot claim benefit of insurance.*"

This prayer erroneously assumes that the carrier in claiming the benefit of insurance in this case under the stipulation in the bills of lading, "denies his liability."

As we have shown above, the claim for benefit of insurance is based, not upon the denial, but upon the admission and assumption of that liability having been incurred. The language of the stipulation is, "that in case of any loss or
95 damage done to or sustained by any cotton herein receipted for, during transportation whereby, any legal liability may

be incurred by the terms of this contract, the company incurring such liability shall have the benefit of any insurance which may have been effected upon, or on account of said cotton "* *."

The Circuit Judge had no other course than to refuse the prayer.

POINT NINTH.

96

The sixth instruction prayed by plaintiff was properly refused, viz: "that if the stipulation in the bills of lading under which the plaintiff's cotton was agreed to be transported by the Atlanta and West Point Railroad, and its connecting lines, giving the carrier the benefit of the shippers insurance is valid, then it only entitles carrier to the policy, as it is in the hand of the shipper or owner at the time of loss or damage, and if said policy is void or unproductive this is no defence to the carrier as against the shipper or owner."

97 If this instruction had been given by the Court to the jury it would have committed the Court to the position of charging the jury that the policy was unproductive, and, if for no other reason, the prayer could not properly have been granted and the instruction given.

The Court could scarcely be justified in assuming such to be the fact, and adopting such fact as the basis of a hypothetical charge, in face of the proof by plaintiff's own witness, Amory, that he knew no defence to the policy which could be set up by the insurer. (*Transcript fol. 38*).

98 The plaintiff, moreover, was bound to give defendant the benefit of the policy without reference to its opinion of its being void or not, or of its being productive or unproductive. Plaintiff was bound to have averred in its complaint that it had given defendant the benefit of the insurance, which it had effected upon the cotton covered by its bills of lading, or that it had offered it to defendant who had refused to accept it, or that the insurance it had effected was unproductive, or that the policy was void, setting forth in its complaint the facts which showed it was so unproductive or void, and was bound to have set forth in its complaint 99 facts sufficient to show, that, for these or other causes,

plaintiff was unable to give defendant the benefit of insurance according to its express promise.

The plaintiff was bound to have so averred in its complaint, in order that defendant might answer thereto, and have made its defence in proof. Not having done so, it was precluded, both by its pleadings and proof, from asking the Court to impliedly assume, in its instruction to the jury,
100 that the policy was either void or unproductive, or to say to the jury that the stipulation for insurance was no defence to the carrier, although unperformed by plaintiff, with no legal excuse given for its non-performance.

The instruction as framed implies that defendant had asserted or maintained that the policy was void or unproductive, which was not the fact. It is moreover clear that no such questions are involved, or could be discussed, in this action. The Circuit Court could not with propriety be asked to base a legal proposition upon the hypothesis
101 that the insurance is invalid, where there is no issue as to its validity, and where it is practically admitted to be valid, by the fact, proved by plaintiff, that it has brought suit against its insurers upon its policies.

POINT TENTH.

The same reply which we have made to plaintiff's sixth exception applies to his seventh exception, in which the Circuit Judge is held to have erred in not saying to the jury "that there is no legal obligation from such stipulation that shipper
102 *shall effect valid insurance, and that if such insurance is invalid this is no defence to an action by the shipper against the carrier."*

It may be that the shipper was under no legal obligation to effect valid insurance—whether the shipper in this case was, or was not, under legal obligation to the carrier here to effect valid insurance, would depend on the circumstantes attending their dealings with each other, to be made matter of proof.

If custom, or any previous dealing should give a particular
103 carrier, dealing with a certain shipper, ground to expect that he would effect insurance, and such expectation should

happen to enter into and form part of the consideration of any convention between them it might well be, that the shipper, in such case, would be held to be under legal obligation of effecting valid insurance, and, most assuredly, if such shipper should contract to effect insurance at all he would be held to the legal obligation of 104
effecting valid insurance. But it is not contended here by defendant, nor is it necessary for it to contend, that plaintiff, by the terms of the special contract contained in his bills of lading, was under legal obligation to effect insurance Defendants contention is that plaintiff, having effected insurance, was bound absolutely, and in good faith, to give defendant the benefit of it, to do nothing which would impair its value or defeat defendant of its benefit, and to omit nothing which could reasonably enable defendant to have the benefit of it. The stipulation in the 105
bills of lading entitled defendant to rely on plaintiff's doing this, and this is the doctrine of this Court in the *Phœnix Insurance Company* vs. *Erie Transportation Company*, and of the cases there cited and approved.

As we have said above, the validity of the insurance effected by plaintiff on the cotton in this case cannot be and is not being litigated in this action. Its invalidity cannot be assumed where there is a total absence of proof to show that it is invalid, and an instruction from the Court based upon such assumption or hypothesis would have been 106
simply misleading and confusing.

This (seventh) instruction prayed for by plaintiff commits the Circuit Judge, in giving it as his charge to the jury, to impliedly and in effect say to the jury, that the insurance which was effected in this case was invalid, without proof that it was so, and against the evidence, *that plaintiff knew of no defence which the Insurance Company had to the policy sued on by it.* It also implies that defendant's position is that the policy is invalid, which was not the fact, and the Circuit Judge could not have given the jury to so understand the defence, by granting the instructions as framed. 107

POINT ELEVENTH.

The Circuit Judge correctly refused the eighth instruction prayed for by plaintiff, viz: "That the shipper may insure or not as he pleases; and if he does insure, the carrier takes such insurance with all its infirmities, and cannot defend against shipper by reason thereof."

108 Here again we have it assumed, that there are infirmities in the insurance, without having a single statement or intimation of what the supposed infirmities consist in, and without proof that there are any such.

As in the matter of the policies being assumed to be void, or unproductive, it was attempted to be taken for granted by plaintiff in the previous instruction prayed for, so in this matter of infirmities in the insurance which the Court is asked to take for granted, either as proved or admitted, the plaintiff has no right to pronounce judgment, and to decide that the policies are either void or unproductive, or that
109 the insurance is affected with infirmities. They cannot be treated as void in law until some judicial tribunal has determined them to be void, and so they cannot be treated as unproductive until shown by proof to be so—and the alleged "infirmities" must be stated and proved. The instruction as prayed also proceeds upon the assumption that the carrier here seeks to defend against shipper by reason of the infirmities of the policy. This is not true. The defendant carrier presumes that the insurance is good, and has the legal right, and is legally bound so to presume,
110 until the contrary is shown. Proceeding upon the presumption, defendant demands that plaintiff should, before it can bring its action, show fulfillment of the promise, or a legal and sufficient excuse for its non-fulfillment.

Moreover as said above there is no such issue in the case.

POINT TWELFTH.

The same reasons we have given in support of the refusal of the Circuit Judge to grant the previous prayer for instructions
111 *apply also to the ninth exception of plaintiff, which asserts that the Circuit Judge erred in refusing to charge the jury*

" that the carrier does not lose his character as carrier by reason of the stipulation in the bill of lading that he shall have the benefit of any insurance effected by the shipper, and that he is primarily liable as carrier to the shipper for loss or damage, if any, arising from exemptions under the law or his contract."

It would have been most misleading to the jury if the Circuit Judge had so instructed the jury, as to leave them 112
under the impression that " primarily liable " meant that the carrier, because he does not lose his character as carrier under the stipulation for insurance, should *first* pay the shipper before he demanded, or had a right to demand, from the shipper the benefit of insurance, and yet this is the only meaning, applicable to the case before the Court and jury, which can be attributed to the words "primarily liable " as used in the ninth exception.

POINT THIRTEENTH. 113

The Plaintiff's tenth exception claims that the Circuit Judge erred in refusing to give the following instruction, " that if the carrier desires the benefit of the shipper's insurance he must first pay the loss, unless the shipper has already been paid by the insurer, and that if the plaintiffs have not so been paid they are entitled to recover the amount of their loss from the defendant."

We have already fully shown, that the giving the benefit of the insurance became the shipper's duty, and the right to have the benefit became the carrier's right, so soon as the 114
loss occurred, and whether plaintiff's promise that defendant, upon incurring liability for cotton destroyed by fire shall have the benefit of his insurance, is fulfilled, by assigning and delivering the policies, or, by paying the insurance money, matters not, the carrier became *eo instanti* entitled to it, and if it were not assigned or paid, or tendered, plaintiff, as the authorities agree, cannot bring his action. Defendant was not bound *first* to pay a loss upon a shipment of cotton to a shipper. who owed defendant (under the terms of the very bill of lading under which the 115
shipper became entitled), the insurance which had been effected upon the same cotton.

The acts to be performed were, to say the least, concurrent acts, and the Courts would not require defendant to pay the shipper *first* and then be put to his action against the payee to recover the identical amount of money.

POINT FOURTEENTH.

116 *The eleventh exception is, that the Circuit Judge should have instructed the jury "that the bills of lading issued by the Atlanta and West Point Railroad reserved the benefit of insurance to the carrier in the event of a liability under the terms of the contract therein only, and that such reservation does not apply to a liability arising under the Statutory law of South Carolina and independent of such contracts."*

The suit here, if it can be held to be properly framed, is not framed to enforce any other liability than that arising upon *contract*. It is not framed to enforce any liability arising under Statute law of South Carolina and *"independ-*
117 *ent of the contract."* As we have shown above, no suit can be properly brought in this case, where the causes of action, if plaintiff have any causes of action, are special contracts in writing, except upon such contracts directly, and cannot be brought upon any liability, independent of such contract, certainly not upon one arising under Statutory law, and the Circuit Judge correctly refused to give the instruction as prayed.

POINT FIFTEENTH.

118 *The twelfth exception is that the Circuit Judge erred in refusing to instruct the jury, "that if the jury find that the plaintiff's cotton was burned because of the absence of such care as under the circumstances, was required of the defendant, the plaintiffs are entitled to recover."*

The vagueness and generality of this instruction are sufficient to condemn it. It suggests, in a way calculated to mislead the jury, that there was proof in the case of the absence of care, but it does not pretend to say *what* acts of
119 carelessness or negligence were done, or, what omission, took place and caused the burning of the cotton, or, that

any acts or omissions had been done or had taken place. Moreover in this case the defendant carrier was entitled under the bill of lading to be held exempt from liability to pay for cotton destroyed by fire "unless the same be proved to have occurred from fraud or gross negligence of the Company. * *" It was an express stipulation of the contract that plaintiff in order to recover must furnish proof of negligence—that is, must show what acts of omission or 120
commission had caused the loss. It was also a stipulation of the contract, that if negligence was proved and the liability was incurred, plaintiff would not be entitled to recover without averring and proving that it had given defendant the benefit of insurance. The instruction was correctly refused.

POINT SIXTEENTH.

The plaintiff's thirteenth exception is, that the Circuit Judge erred in refusing to instruct the jury "that if the defendent knew, at a period anterior to receipt of plaintiff's cotton by At- 121
lanta and West Point Railroad, that its succeeding carrier could not transport the cotton of the plaintiff because of its arrangement with the steamboat company, and that such cotton would thus accumulate in its uncovered yards in close proximity to its passing trains, and failed to give notice to the Atlanta and West Point Railroad thereof, then the defendant is not entitled to the exemptions of the bills of lading in this case."

A more conspicuous example of the danger of a hypothetical charge to a jury could scarcely be imagined, than is to be found in the structure of hypotheses, which is built 122
up in this instruction which the Court was asked to give to the jury. "If the jury find," "that if the defendant knew," &c., "that its succeeding carrier could not transport," &c., because of its arrangement with the Steamboat Company," &c., "and that such cotton would thus accumulate," &c., "and failed to give notice," &c., then, &c.

When analyzed, we find that each stone of the hypothetical structure involves the assumption of facts proved, which if given by the Circuit Judge as his instruction to the jury would have unavoidably misled the jury 123
into the belief that the Court understood the proof to be in accordance with the respective suppositions.

There was no warrant in the evidence in the case for the assumption, that, at a period anterior to receipt of plaintiff's cotton by Atlanta and West Point Railroad at different points in Georgia, it was a fact, that its succeeding carrier could not transport the cotton of plaintiffs, because of its arrangement with the Steamboat Company, and that such cotton would thus accumulate in its uncovered yards in
124 close proximity to its passing trains—nor that such facts and the complicated consequences involved in them were known to or could be ascertained by defendant at any period anterior to the plaintiff's shipments of cotton in Georgia. There was nothing to support the assumption that defendant could have anticipated, or was bound to anticipate, the occurrence of an accumulation, that any undue accumulation of cotton in defendant's yards was due to its arrangement with the Steamboat Company, nor that it, at any given time, beeame the duty of defendant to look
125 out for plaintiff's interest, as its general agent or to look beyond the scope of its special contract, or that it became its duty to warn plaintiff to discontinue its purchases and shipments of cotton in Georgia, or to warn the Atlanta and West Point Railroad not to receive or transport any more of plaintiff's cotton.

The instruction prayed for fails to show, at what period anterior to the receipt of plaintiff's cotton by Atlanta and West Point Railroad, defendant was under supposed obligation to give notice to that road, and to show what notice
126 should have been given. It likewise fails to show, what logical connection there is in the suggested failure of defendant to give the supposed notice, to the Atlanta and West Point Railroad, and the stipulation in the contract, entitling the defendant to the exemption from liability for loss by fire. If it was intended by the prayer to suggest, that defendant could not claim the exemption because it could not in law claim exemption from a loss by fire caused by its own negligence, then the instruction asked for does not show (so that the jury could understand) in what acts
127 or omissions such negligence consisted, whether in the contract it had with the Steamboat Company; or in the

failure to give the notice; or in the stowing of the cotton carelessly; if the first, it does not suggest in what way the contract with the Steamboat Company was at fault; if the second, it does not show, whether the duty to give the notice belonged to its undertaking as common carrier, or arose from some special contract, and if so, what contract? If the third, it fails to show whether the supposed negligence consisted in the stowing the cotton in uncovered 128
yards, or in close proximity to its passing trains, or what constituted such close proximity, as to make the stowing negligent.

The covert implication of the whole instruction is that defendant was guilty of negligence and such would have been the impression inevitably conveyed to the jury if the Circuit Judge had adopted the implications of facts as proved, which was involved in the instruction.

The proof really showed the contrary of all the hypotheses put forward in the prayer. 129

The bills of lading, (Transcript, Folio 63), do not show any contract undertaking by the defendant as the connecting line terminating at Charleston to prevent accumulation of cotton in its yards, or to control the Steamboat Company in its work of taking the cotton away, or to notify plaintiff in advance of its shipments, or to notify the Atlanta and West Point Railroad, in advance, of its receiving and loading plaintiff's cotton at points in Georgia, of an anticipated or actual accumulation of cotton in defendant's yards in Charleston, South Carolina. 130

On the contrary, they show an express exemption stipulated for from "delay or detention" from any "cause whatever unless the same be proved to have occurred from the fraud or gross negligence of defendant, whether the cotton be in actual transit or be waiting shipment or delivery or be in depots at stations on wharves, &c," * * and in no event will the said Atlanta and West Point Railroad Company, or the Companies constituting the line or any one of them be responsible for loss or damage, or delay, or detention arising from storms, * * accidents, * * * of inland 131
navigation of whatever nature or kind unless a special re-

ceipt be taken therefor and a charge of —— per cent. on the value of the article, or articles to be paid prior to the shipment of the same for insurance against the above named risks."

Again it was proved, that it was not negligence, as is impliedly assumed in the instruction, on the part of defendant to have cotton to accumulate in its yards, or to
132 stow cotton in uncovered yards, or in proximity to the trains passing through its yards. The testimony of C. D. Bateman, witness for plaintiff, (Transcript, Folio 72), is, "as to the block of cotton referred to, there was not in the yard any unusual amount of cotton for that time of the year; that the Railway Company always has that amount at that season of the year * * " (at Folio 73). "The cotton in the yards of the Railway Company was guarded by watchmen with buckets of water distributed through the yards. All the railroads in the city, and all the roads
133 witness knows of, follow the general practice of putting cotton in the open yard and not in shed * * knows of no large corporation doing it. The yard in which this cotton was stored is surrounded by high fences closed in; every precaution is taken."

J. Averill, Master of Transportation of the South Carolina Railway, an old railroad man, (formerly in employ of the Baltimore and Ohio Railroad Company), says, (Transcript, Folio 76), "the usual mode of stowing cotton by railways and railroad companies at terminal points on their
134 road is to unload it in yards; knows of no Company doing the business of the South Carolina Railway which undertakes to provide fireproof warehouses; does not think it would be practicable for any other roads in the South with their facilities, nor could they do their business if they undertook to provide fireproof warehouses; the South Carolina Railway Company has taken every precaution it could in regard to cotton stowed in its yards, * * so that under ordinary circumstances it had every facility it conld have within reason. The precautions observed as regards
135 the engines on the tracks traversing the yards are that the engines are provided with the most approved spark

arrestors. These are required to be kept in order and the dampers on the ash pan closed. Those are the two main precautions. Every engine has to be inspected every time it comes into the round-house. The arrangement for arresting sparks has, since 1875 given satisfaction. The Company has hauled thousands of bales in open cars and have never had a bale burned except in the latter part of 1879, * * with an engine that had not been overhauled, * *" 136

John B. Peck, testified to like effect, also other witnesses.

In view of this testimony which was wholly uncontradicted, it would have been unjustifiable for the Circuit Judge to assume as true, what he from the testimony knew not to be true, and for him by plain implication to suggest to the Jury that such was the case in proof.

POINT SEVENTEENTH.

The plaintiff's fourteenth prayer was correctly refused, viz:

" If the Jury find from the evidence that the danger of destruction from fire to plaintiff's cotton was increased by the accumulation of large quantities of cotton in defendant's uncovered yards, then it was the duty of the defendant to proportion its care to such increased danger, and its failure to do so, is negligence for which it is liable to plaintiff." 137

The Court properly refused to give this instruction to the Jury, and, by giving it, to virtually to say to the Jury that the defendant did not proportion its care to the supposed increased danger, and that it failed to do so, and is therefore negligent; and that there was a dangerous accumulation of 138 cotton in its yards.

POINT EIGHTEENTH.

The plaintiff's fifteenth prayer for instruction has the same faults which properly caused the Court to refuse the previous prayers. It assumes as proved that which was not only not true according to the evidence, but the proof of which being otherwise, had not been contradicted in the testimony, viz: That the exposure of cotton in uncovered yards is negligence.

139

POINT NINETEENTH.

The sixteenth instruction prayed for by the plaintiff is, "that if the Jury find that the fire which destroyed the cotton of the plaintiffs, was communicated from the engines of the defendant, then under Section 1511 of the Revised Statutes of South Carolina, the defendants are liable, independent of any question of negligence and the plaintiffs are entitled to recover."

140 Besides the fault of this instruction, a fault which runs through all of the instructions asked for by plaintiff, viz: in assuming and almost asserting, that the fire was communicated from the engines of defendant (of which there was no proof), the Court was asked to instruct the Jury that under a certain provision of a South Carolina Statute, defendant is liable, "independent of any question of negligence."

We submit, that "independent of any question of negligence," defendant under these bills of lading cannot under any law of the State, be liable. This Court by its decisions
141 has held that a carrier cannot stipulate against its own negligence, that is for exemption from loss by reason of its own negligence, but it has never been held, that it can be held liable, "independent of any question of negligence." The case made or attempted to be made by plaintiff here, against defendant is not a case of violation of a Statute of the State of South Carolina. If it is anything, it is an action against defendant for alleged negligence, and aims to make it liable therefor, but is not "independent of negligence." The alleged negligence is the gist of the action.

142

POINT TWENTIETH.

There was no error in the Circuit Judge's instruction to the jury according to defendant's first request to charge, viz: That the bill, or bills of lading, under which the cotton of plaintiffs in this case was transported by the defendant constituted the contract of the parties, and the plaintiffs are bound by the stipulation that the defendant Company "shall have the benefit of any insurance that may have been effected upon or on account of
143 *said cotton."*

If there clearly appears to be a special contract between the shipper and the carrier, such a contract governs the case.

Angel on Carriers, p. 224, § 220.

The bill of lading is the contract between the shipper and the Company, * * and the terms and conditions of the contract regulate and determine the duties and obli- 144
gations of the contracting parties.

Piedmont Mg. Co. vs. Columbia and Greenville R. R. Co., 19 So. Ca., 353.

On contract for through transportation exemptions inure to connecting carriers although not so expressly provided.

Manhattan Oil Co. vs. Camden and Amboy R. R. and Transportation Co., 54 N. Y., 197.

Acceptance of carrier's receipt creates a contract accord- 145
ing to its terms between him and the shipper.

Hutchinson on Carriers, § 240, § 241.

Bank of Kentucky vs. Adams Express Co., 93 U. S., 174.

POINT TWENTY-FIRST.

The Circuit Judge did not err in instructing the jury according to defendant's second request, viz: "The plaintiffs before they can recover against defendant here must show that they per- 146
formed their part of this contract by proving that they have given to the South Carolina Railway Company the benefit of the insurance, or that they have been ready to perform the contract by tendering such benefit to defendant without condition or qualification, and the same was refused, nor in instructing the jury according to defendant's third request, viz: "That the offer contained in the letter of R. H. Gardiner, attorney for plaintiff, July 22, 1884, is not such performance of his part of the contract by plaintiff as defendant was entitled, and plaintiff cannot therefore recover."

The proof shows that the contract here contain mutual 147

promises—"a promise for a promise"—the promise on either side going to the whole consideration on the other side—a case of mutual dependant covenants or agreements, which were to be performed at the same time, wherein the consideration was executory. The defendant promised to carry the goods and deliver to its connecting carrier. The plaintiff promised to pay the freight, and that in case
148 of loss whereby any liability should be incurred by defendant by the terms of the contract defendant "shall have the benefit of any insurance which may have been effected upon, or on account, of said cotton."

"Neither of the parties to a mutual contract can recover against the other for a breach thereof, or put the other in default without a tender of performance upon his part, or showing a willingness and ability to perform, and that actual performance was prevented, or expressly waived by the other."

Nelson vs. Plimpton Fire-Proof Elevator Co., 55 N. Y., 480.

Per Lord Kenyon. "The case decided by Lord Holt in Salkeld, 112, if
149 indeed so plain a case wanted that authority to support it, shows that where concurrent acts are to be done, the party who sues the other for non-performance must aver that he has performed, or was ready to perform his part of the contract. Then the plaintiff in this case cannot impute to the defendant the non-delivery of the corn without alleging that he was ready to pay the price of it. A plaintiff who comes into a Court of Justice must show that he is in a condition to maintain his action. * * * *Gorse, J.* It is difficult to reconcile all the cases in the books on the subject of condition precedent, but the good sense to be extracted from them all is, that if one party covenant to do one thing in consideration of the other party doing another, each must be ready to perform his part of the contract *at the time he charges the other with non-performance.*"
250 *Morton vs Lamb, 7 Term. R., 125.*

As to the letter of Gardiner (Transcript—folio88-89.) it proposed to give to defendant not *the insurance*, nor *the policies*, nor the control of the suit against the insurers of plaintiff without condition or qualification—but offered to give to defendant in conjunction with another carrier, in no way connected with this defendant, the control of suits brought on policies against the American, and against the Boylston Insurance Companies, the latter covering loss in cotton with
151 which the defendant has no concern. This proposal was accompanied with a condition which rendered acceptance

impracticable viz: to give your railroad *and* the Norfolk Railroad control of these suits, or in case only one railroad accepts this offer we will admit as associate counsel any proper person such Railroad may designate, *on receiving from each railroad accepting the offer payment in full of our claim against the carrier with costs and interest from date of fire; and in case of our relinquishing control of the suits we shall require satisfactory assurance of our receiving the differ-* 152
ence, if any, between the amount of our claim under the bill of lading, and the amount recovered under the policies, the cotton being valued in the policies at $55 to $65 per bale.

Your answer to this proposition we shall consider final, and we shall consider ourselves at liberty, if you refuse it, to take any course of action that may seem most to our advantage, though it may prevent your subrogation to our rights, if such a right of subrogation is established." * *

It is universal law, that a tender or offer of performance must be unconditional. 9 Bac. Abr., 315, and authorities 153
cited.

It is sufficient to read the letter of Gardiner, attorney for plaintiff, to see that the pretended offer of performance, a tentative proposal or feeler rather than offer, was not a tender in law of anything, and was so burdened with conditions as to destroy its character and sufficiency as a tender, and was properly rejected.

Besides the threat which accompanied it, that if not accepted, plaintiff would feel itself at liberty to defeat defendant's right of subrogation, which alone was enough to 154
defeat it as a proper tender, the proposal demanded, as the imperative condition of the proposed performance by plaintiff of its covenant, that defendant should purchase such performance by the previous payment in full of plaintiff's claim, with costs and interest from date of fire, and also furnish security for a possible difference between the amount of said claim under the bill of lading and the amount recovered under the policies. It also proposed to involve defendant in a litigation of the Jackson Manufacturing Company against the Boyleston Insurance Company, in reference 155
to a loss of cotton by a fire at Norfolk, with which the

South Carolina Railway Company had no connection. All of which conditions invented by plaintiff were improperly thrust into the pretended tender and rendered it wholly insufficient.

POINT TWENTY-SECOND.

156 *The Circuit Judge was correct in instructing the jury in accordance with defendant's fourth request, viz: "That the plaintiff cannot recover from the South Carolina Railway Company unless it has first given to that Company credit for the amount of the insurance effected by plaintiff or accounted for the same."*

Under the previous points in this argument we have quoted the authorities which fully sustain the position here taken.

The stipulation of plaintiff to the written contract is, that defendant *shall have the benefit* of any insurance which may
157 have been effected. This covenant can only be discharged by the active exercise by plaintiff of all possible exertion to secure to defendant the benefit of such insurance. The plaintiff before it can recover must aver and prove that it done so. If before it has enforced and collected its insurance, it sees fit to come upon defendant for a settlement of the loss, it must begin by giving credit to defendant for the insurance, it, the plaintiff is entitled to under its policy—Plaintiff cannot collect first and account afterwards.

As we have shown above, the law is that "if one party covenant to do one thing in consideration of the other
158 party doing another, each must be ready to perform his part of the contract at the time he charges the other with non-performance."

(*Morton vs. Lamb*, 7 *Term Rep.*, 125).

(*Nelson vs. Plimpton Fire Proof Elevator Co.*,, 55 *N. Y.* 480).

POINT TWENTY-THIRD.

The Circuit Judge correctly instructed the jury according to
159 *defendant's fifth request, as follows, viz: "Unless the jury find that the loss is proved to have occurred from the fraud or negli-*

gence of the defendant Company they must find for defendant."

The burden of proof, under the express provision of the bill of lading was upon the plaintiff to show that the loss from fire "occurred from the fraud or gross negligence of the Company or Companies, their agents or servants, whether the cotton be in actual transit or be awaiting shipment or delivery, or be on depots, on wharves, at sea, or in port, or on cars, boat, vessel or steamer." (*Transcript, Folio 63*). 160

In Whitworth vs. Erie Railway Company, it was said:

"The bills of lading contain a general exemption from loss by fire, and the loss having occurred from this cause it was incumbent on the plaintiff in order to avoid the effect of this exemption to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of the defendant's duty. The burden was upon the plaintiff to show facts taking the case out of the operation of the exemption clause. (*Lamb vs. Camden and Amboy R. R. and T. Co., 46 N. Y., 271; Caldwell vs. The New Jersey Steamboat Co., 47 N. Y., 282; Cochran vs. Dunmire, 49 Ib., 252*). * * The occurrence of a fire does not 161
alone justify the inference of negligence. In the absence of all explanation of the origin of the fire, or of evidence tending to show that it was in the power of the defendant to have made such explanation; or that by the exercise of reasonable care the fire would not have occurred, no presumption of negligence was raised. * * *

Whitworth vs. Erie Railway Co., 87 N. Y., 413

POINT TWENTY-FOURTH.

The Circuit Judge did not err in instructing the jury according to defendant's sixth request, viz: That before the jury can find that the loss occurred from the negligence of the Company, they 162
must find that the loss occurred from the failure of the Company to take some precaution, or to do some act which was reasonable and proper under the circumstances.

This proposition of law is too obvious to need authority to sustain it. It flows directly from the definition of negligence in all the text-books.

POINT TWENTY-FIFTH.

The Circuit Judge correctly instructed the jury according to defendant's seventh request, viz: 'That in determining the inter- 163